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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-2028

ALDENS, INC.,

Appellant,

v.

JAMES H. TULLY, JR., MILTON KOERNER and THOMAS H. LYNCH, Constituting the Tax Commission of the State of New York,

Appellees.

JURISDICTIONAL STATEMENT

BERNARD G. SEGAL,
RALPH S. SNYDER,
JAMES D. CRAWFORD,
Attorneys for Appellant.

SCHNADER, HARRISON, SEGAL & LEWIS
1719 Packard Building
Philadelphia, Pennsylvania 19102

RAYMOND N. FRIEDLANDER
5000 W. Roosevelt Road
Chicago, Illinois 60607

P. J. DIQUINZIO
3400 Centre Square West
Philadelphia, Pennsylvania 19102
Of Counsel.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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Appellees.

JURISDICTIONAL STATEMENT

Aldens, Inc. asks this Court to note jurisdiction to review the judgment of the Court of Appeals of the State of New York entered in the above case on March 25, 1980.

OPINIONS BELOW

The final opinion of the Court of Appeals of the State of New York (A22-A34)[1] is reported at 49 N. Y. 2d 525 (1980). The opinion of the Supreme Court of the State of New York, Appellate Division, Third Department (A14-A21), is reported at 70 A. D. 2d 720, 416 N. Y. S. 2d 429 (1979). Neither the opinion of the Supreme Court of the State of New York, Special Term, County of Albany (A8-A11) nor the determination of the Tax Commission of the State of New York (A1-A5) has been officially reported.

JURISDICTION

This case arose on appellant's application to a Special Term of the Supreme Court of the State of New York (A6-A7), in a proceeding pursuant to New York's Civil Practice Law and Rules, Article 78, to annul a determination of the Tax Commission of the State of New York that appellant owed uncollected local use taxes for the period August 1, 1965 through November 30, 1969 in the amount of $93,902.06, including penalties and interest, in accordance with Articles 28 and 29 of the Tax Law of New York State, N. Y. TAX LAW §§ 1101 *et seq.* (McKinney 1975). (A1-A5). The Supreme Court dismissed appellant's application (A6-A7). Appeal was taken to the Supreme Court of the State of New York, Appellate Division, Third Department, which affirmed the trial court decision, two justices dissenting. (A12-A13).

An appeal was then taken to the Court of Appeals of the State of New York, which affirmed the order of the Appellate Division on March 25, 1980. (A34-A35). No-

1. Reference to "A" pages are to pages in the appendix to this statement. References to "R." pages are to the Record on Appeal in the Court of Appeals.

tice of appeal, copies of which are attached at A36-A39, was filed on June 18, 1980 both with the Clerk of the Court of Appeals of the State of New York and with the Clerk of the Supreme Court of the State of New York.

Direct appeal to this Court is taken from the final judgment of the Court of Appeals, holding that appellant was required to collect local use taxes on interstate sales although appellant's only contact with the taxing localities was its interstate sales. Appellant argued in the courts below that both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment of the federal constitution prohibit the imposition of the duty to collect local use taxes upon appellant since it had no significant contacts with such localities.

This Court has jurisdiction pursuant to 28 U. S. C. Section 1257(2).

This appeal lies because the highest court of the State of New York has sustained the imposition of the duty to collect local use taxes upon a purely interstate trader without local contact under the provisions of the Tax Law of New York State against a challenge that such imposition is unconstitutional as applied to appellant. **Cohen v. California,** 403 U. S. 15 (1971); **Warren Trading Post Co. v. Arizona Tax Commission,** 380 U. S. 685 (1965); **Dahnke-Walker Milling Co. v. Bondurant,** 257 U. S. 282 (1921).

QUESTION PRESENTED

Do not the Commerce Clause and the Due Process Clause of the Fourteenth Amendment prohibit a state from imposing upon an interstate trader the duty of collecting use taxes imposed by localities with which the trader's only contact is by interstate mail and common carrier?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clause 3 of the Constitution of the United States provides:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States. . . ."

The Fourteenth Amendment of the Constitution of the United States provides:

> "Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

The pertinent provisions of the Tax Law of New York State are as follows:

TAX LAW

ARTICLE 28.

§ 1101. Definitions

* * *

(8) Vendor. (i) The term "vendor" includes:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article;

(C) A person who solicits business either by employees, independent contractors, agents or other representatives or by distribution of catalogs or other advertising

matter and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article; and

(D) Any other person making sales to persons within the state of tangible personal property or services, the use of which is taxed by this article, who may be authorized by the tax commission to collect such tax by part IV of this article; * * *.

§ 1105. Imposition of sales tax

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

§ 1110. Imposition of compensating use tax

Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within the state . . . (A) of any tangible personal property purchased at retail,* * *.

§ 1131. Definitions

When used in this part IV,

(1) "Persons required to collect tax" or "person required to collect any tax imposed by this article" shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership.

(2) "Customer" shall include: every purchaser of tangible personal property or services; every patron paying or liable for the payment of any amusement charge; and every occupant of a room or rooms in a hotel.

(3) "Tax" shall include any tax imposed by sections eleven hundred five, or eleven hundred ten, and any amount payable to the tax commission by a person required to file a return, as provided in section eleven hundred thirty-seven.

(4) "Property and services the use of which is subject to tax" shall include: (a) all property sold to a person within the state, whether or not the sale is made within the state, the use of which property is subject to tax under section eleven hundred ten or will become subject to tax when such property is received by or comes into the possession or control of such person within the state; * * *

§ 1132. Collection of tax from customer; proof required for registration of motor vehicles.

(a) Every person required to collect the tax shall collect the tax from the customer when collecting the price, amusement charge or rent to which it applies.* * *

§ 1133. Liability for the tax

(a) Except as otherwise provided in section eleven hundred thirty-seven, every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article.* * *

ARTICLE 29.

§ 1210. Taxes of cities and counties administered by state tax commission

Notwithstanding any other provision of law to the contrary, but subject to the limitations and exemptions

in part II of this article, any city in this state or county in this state, except a county wholly within a city, acting through its local legislative body, is hereby authorized and empowered to adopt and amend local laws, ordinances or resolutions imposing in any such city or county the following taxes,* * *

(a)(1) Either, all of the taxes described in articles twenty-eight of this chapter,* * *.

§ 1212. Certain taxes of school districts administered by state tax commission

(a) Any school district which is coterminous with, partly within or wholly within a city having a population of less than one hundred twenty-five thousand, is hereby authorized and empowered, by majority vote of the whole number of its school authorities, to impose for school district purposes, within the territorial limits of such school district and without discrimination between residents and nonresidents thereof, the tax described in subdivision (b) of section eleven hundred five,* * *.

§ 1213. Deliveries outside the jurisdiction where sale is made

Where a sale of tangible personal property or services, other than those described in subdivision (b) of section eleven hundred five, including an agreement therefore, is made in any city, county or school district, but the property sold or the property upon which the services were performed is or will be delivered to the purchaser elsewhere, such sale shall not be subject to tax by such city, county or school district. However, if delivery occurs or will occur in a city, county or school district imposing a tax on the sale or use of such property, the vendor shall

be required to collect from the purchaser, as provided in section twelve hundred fifty-four, the aggregate sales or compensating use taxes imposed by the city, if any, county and school district in which delivery occurs or will occur, for distribution by the state tax commission to such taxing jurisdiction or jurisdictions. For the purpose of this section delivery shall be deemed to include transfer of possession to the purchaser and the receiving of the property by the purchaser.

§ 1250. Administration and collection

The taxes imposed under the authority of sections twelve hundred ten, twelve hundred eleven, twelve hundred twelve and twelve hundred twelve-A shall be administered and collected by the state tax commission in the same manner as the taxes imposed under article twenty-eight of this chapter are administered and collected by such commission.* * *

§ 1254. Duty to collect taxes

(a) Every person required to collect tax, as defined in section eleven hundred thirty-one, who is required to collect any state tax imposed under section eleven hundred five, eleven hundred six or eleven hundred ten, shall at the same time collect any applicable tax imposed by a city, county or school district . . . and where the state tax is a retail sales tax, shall also collect any compensating use tax which may be applicable as provided in sections twelve hundred thirteen * * *.

STATEMENT OF THE CASE

The Facts of the Case

The facts have been stipulated. During the years in question, appellant operated a mail order business in fifty states, including New York. Its main office and several warehouses were located in Illinois, where it employed over 4,000 workers. (R. 43). Appellant had no inventory in New York State outside of piece goods or raw materials which were there for processing by manufacturers or temporarily stored pending shipment to manufacturers. No sales of materials or offers of sales were made in New York State by any employee or salesman of appellant. (R. 44)

Aldens Catalog Offices, Inc., a wholly owned subsidiary of appellant, was organized under the laws of Indiana, with its principal office in Chicago, Illinois. This corporation was empowered to do business in New York State. It had four telephone offices in New York State: in Buffalo, New York City, Rochester, and Syracuse.[2] It carried phone listings in these locations. Such telephone listings were not contained in any telephone directories serving metropolitan areas other than those in which the offices were located. Its employees performed their employment duties entirely within each of their offices. The primary duties of these employees consisted in taking orders over the telephone within the offices. They had the secondary duty of soliciting customers by telephone from within the office. They were not required to nor did they engage in any door-to-door or other type of sales efforts obliging them to travel about, either in the areas in which the offices were located or elsewhere. (R. 44-45).

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2. For a portion of the period another subsidiary of Aldens, Aldens Buying Corp., maintained an office in New York City but not elsewhere within the State of New York.

Appellant's customers in New York State made purchases in several ways: by filling out an order blank from an Alden's catalog or from a mail order form and mailing it to the Chicago office; by telephoning an order to a New York office which then sent the order to Chicago; by agreeing to a telephone solicitation by local employees, in which case the order was then sent to Chicago; or by personally visiting one of the four New York offices and placing an order there which was then sent to Chicago. (R. 45). Appellant's New York offices were authorized but not encouraged to receive orders from persons outside the local trade area. Acceptance of every order described herein took place in Chicago. (R. 46).

All payments for goods were made by buyers directly to appellant's Chicago office. (*Id.*). Any credit checks of deferred payment buyers were made by the Chicago office. Appellant shipped ordered items by mail or by common carrier. (*Id.*). Appellant collected all *state* use taxes on shipments of goods delivered to customers in New York, but it collected *local* use taxes only on shipments of goods delivered to customers in areas in New York State where it had offices. (R. 46-47).

The State Tax Commission Determination

On March 5, 1970, the New York State Sales Tax Bureau issued a notice of determination and demanded payment of use taxes by appellant in the amount of $77,933.44 plus penalty and interest, for a total of $93,902.06, for the period August 1, 1965 to November 30, 1969. The requested payment was for local use taxes for goods shipped to localities other than the four in which appellant's New York offices were located. (R. 39, 41).

Appellant requested the Tax Commission of the State of New York to review and reverse the Sales Tax Bureau's determination. (R. 38). On August 16, 1977, the Com-

mission issued its determination that the deficiencies had been properly determined by the Bureau. (A5). It concluded that the Tax law of New York State had granted the local governments the power to impose use tax collection obligations; that appellant was a person required to collect the tax by that law; and that the obligation to collect the local use taxes imposed by all jurisdictions in the state did not impose any undue burden upon interstate commerce nor violate the Due Process Clause of the Fourteenth Amendment. (A4-A5).

The Decision of the Special Term of the Supreme Court

On July 18, 1978, a Special Term of the Supreme Court of the State of New York dismissed appellant's application to review the determination of the Tax Commission. (A7). Like the Tax Commission, the New York Supreme Court simply concluded that once New York State had acquired jurisdiction over an out-of-state vendor for compensating use tax purposes that vendor must collect all locally-imposed use taxes. (A11).

The Decision of the Appellate Division

The decision of the Special Term of the Supreme Court was affirmed on appeal to the New York State Supreme Court, Appellate Division, Third Department. Although the court stated that the same constitutional considerations which justify imposing responsibility for the collection of state taxes are equally applicable to local taxes, it found that "the protection of the Interstate Commerce Clause is lost once a corporation is found to have a sufficient presence within the State." Since appellant had sufficient contact with the State of New York to require it to collect state use taxes, it could be required to collect local use taxes, even of those localities with which it had no such contacts. 70 A. D. 2d at 723, 416 N. Y. at 428; A19-20.

President Justice Mahoney and Justice Sweeney, dissenting (*Id.* at 723-24, 416 N. Y. 2d at 428-29; A20-A21), argued that the same constitutional rule prohibiting the imposition of a duty to collect state use taxes upon a foreign corporation which merely solicits interstate sales without a sales office or sales force in the taxing state should apply equally to the collection of use taxes imposed by local governments, citing this Court's decision in **National Bellas Hess, Inc. v. Illinois Department of Revenue**, 386 U. S. 753 (1967).

The Decision of the Court of Appeals

The Court of Appeals affirmed, rejecting both the argument that the taxing statute did not impose upon appellant the duty of collecting use taxes from localities with which its only contact was through interstate commerce and the argument that, if the statute did impose this duty, it was unconstitutional under the Commerce and Due Process Clauses.

Addressing itself to the Commerce Clause and Due Process issues, the court noted that the two claims were closely related: "State taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." 49 N. Y. 2d at 534; A30-31, *citing* **National Bellas Hess,** *supra,* 386 U. S. at 736-37. However, the court found that decision inapplicable on the ground that in insuring protection of commerce among the several states no such "intrastate partitioning" was contemplated. *Id.* at 535; A31. The court further noted that this Court's cases dealing with the obligation to collect use taxes have all dealt with state, rather than local use taxes. *Id.;* A31.

But what the court deemed to be decisive in the instant case was its belief that appellant's obligation to col-

lect local use taxes had been imposed by state, not local action. The court relied on the facts that the local use taxes were a product of enabling state action and that the state law permitting local use taxes placed the obligation for collecting them upon those sellers who maintained a place of business in the state and made sales to persons within the state. Thus, the court concluded that the collection obligation was imposed by the state and not its localities. *Id.;* A31-A33.

Moreover, the court found that appellant's activity within the state was sufficient " 'adequately [to] establish a relationship or "nexus" between the [appellant] and the State' " such that the obligations imposed are not unconstitutional, *citing* **National Geographic Society v. California Equalization Board,** 430 U. S. 551, 556 (1977), which it found controlling. *Id.* at 535-36; A32. It found immaterial both the fact that the taxes were imposed by local ordinance and the fact that, whereas California provided benefits which justified imposing tax collection duties upon the National Geographic Society, the taxing localities here provided no benefits to appellant at all.

THE ISSUES ARE SUBSTANTIAL

This appeal seeks to have the Court make clear that, whatever power a state may have to impose use tax collection burdens upon a corporation doing business within the state, both the Due Process and the Commerce Clauses deny to localities in that state or to the state acting, as the court below found, for the localities, the power to impose the burden of collecting their use taxes upon such a corporation absent "some definite link, some minimum connection, between [the local jurisdiction] and the person, property, or transaction it seeks to tax." **National Bellas Hess, Inc. v. Illinois Department of Revenue,** 386 U. S. 753, 756 (1967).

In **National Bellas Hess,** this Court held that the Commerce Clause and the Due Process Clause of the federal constitution prohibited the imposition of state use tax collection obligations upon interstate "mail order sellers . . . who do no more than communicate with customers in the state by mail or common carrier." *Id.* at 758. The present appeal presents the application of the situation in **National Bellas Hess** to locally-imposed use taxes.

The Court of Appeals adopted the view that constitutional limitations on the burden which may be imposed upon interstate commerce do not contemplate "intrastate partitioning." 49 N. Y. 2d at 535; A31. Thus, the same contacts which would not justify a state in imposing a tax collection burden upon an interstate vendor will permit a county, city, borough, township, village, school or taxing district to do so. The decision below would thrust upon thousands [3] of mail order houses the tax collection obligations and regulations of countless local governmental units

3. U. S. Bureau of the Census, Statistical Abstract of the United States, 1979, pp. 831, 832, 836.

in whose territories any one of these businesses had no presence—property, employees or activities—and with whose residents its only contact is by interstate mail, telephone, or common carrier.

This Court, on the other hand, has recognized that "the cumulative effect [on interstate commerce] . . . of flat municipal taxes . . . is obviously greater than that of any tax of statewide application." **Nippert v. City of Richmond,** 327 U. S. 416, 429-30 (1946). Indeed, in **National Bellas Hess,** *supra,* 386 U. S. at 759-60, this Court took note of the potential for unjustifiably burdening interstate commerce with a "virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose a 'fair share of the cost of the local government.'"

Moreover, the Court's focus on the concept of a "fair share of the cost of the local government" indicates that its requirement of an adequate "link" between the entity upon which the tax collection obligation was imposed and the taxing jurisdiction reflects concern with due process notions of fairness as well as fears of unduly burdening interstate commerce. Appellant's business within the State of New York was strictly confined to the boundaries of the four counties and cities within which it did business. Its sole contacts with the localities at issue in this case were limited to the mailing in of catalogs and flyers and the shipment of goods to customers in these localities by mail or common carrier. Consequently, these localities have not "given anything for which [they] can ask return." **National Bellas Hess,** *supra,* 386 U. S. at 756.

The Court of Appeals failed to recognize the manifest unfairness of the application of the local use tax collection scheme to appellant and has ignored this Court's definition of an "area of trade free from interference by the States." **Great Atlantic & Pacific Tea Co. v. Cotrell,**

424 U. S. 366, 370 (1976). It is so that the Court may remedy these errors that we bring this appeal.

Both the Due Process Clause of the Fourteenth Amendment and the Commerce Clause Prohibit the Imposition Upon Appellant of an Unfair and Unduly Burdensome Duty To Collect Use Taxes for Localities With Which Appellant's Only Contact Is Through the Mails and Common Carriers, as Part of a General Interstate Business.

In the face of a constitutional argument which most forcefully implicates the "[policy] of the Commerce Clause . . . to ensure a national economy free from . . . unjustifiable local entanglements," **National Bellas Hess,** *supra,* 386 U. S. at 760, the Court of Appeals, while admitting that there are constitutional limitations on the burdens which may be placed on interstate commerce, concluded that "it does not follow . . . that that burden is to be measured by further compartmentalization of each state into its municipal subdivisions." 49 N. Y. 2d at 534-35; A31. Yet such "compartmentalization" has always been significant under the Commerce Clause and failure to do so results in precisely the type of unjustifiable burden with which this Court and Congress have been most concerned and which is the focus of this appeal.

Consequently, this Court has struck down both state *and* local taxation schemes because of their potentially harmful effects on interstate commerce without drawing any legal distinction between the tests and constitutional reasoning to be applied to those situations in which taxes emanated from local, rather than state, taxing authorities. *See, e.g.,* **Memphis Steam Laundry Cleaner, Inc. v. Stone,** 342 U. S. 389 (1952); **Nippert v. City of Richmond,** 327 U. S. 416 (1946); **Robbins v. Shelby County Taxing Dis-**

trict, 120 U. S. 489 (1887). Indeed, this Court has explicitly recognized the multiplication of burdens that may result from local, as opposed to statewide taxation:

> The potential excluding effects for itinerant salesmen . . . are magnified many times by recalling that the tax is a municipal tax, not one imposed by the state legislature for uniform application throughout the State.
>
> It is true that in legal theory the municipality exercises by delegation the State's legislative power and that prior decisions here have not rested squarely upon any difference between a tax municipally imposed and one laid by the legislature. But the cumulative effect, practically speaking, of flat municipal taxes laid in succession upon the itinerant merchant as he passes from town to town is obviously greater than that of any tax of statewide application likely to be laid by the legislature itself.

Nippert v. City of Richmond, *supra,* 327 U. S. at 429-30 (referring to fixed-sum license taxes).

In **National Bellas Hess,** *supra,* 386 U. S. at 759-60, this Court struck down the imposition of a statewide use tax collection obligation upon a mail order seller partly because of the burden that would be placed upon interstate commerce if the tax collection obligation were upheld. The seller in that case had no local agents in the taxing state, no retail stores, no wholesalers, no jobbers or salesmen. Although the tax considered in that case was one of statewide application, the Court recognized that the potential burden of collecting local use taxes upon interstate commerce was even greater than the burden of collecting statewide taxes:

> For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and record keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose a "fair share of the cost of the local government."

Id. at 759-60.

The Court of Appeals decision in this case involves appellant's business in just such a "welter of complicated obligations." Appellant discharged its obligation to collect the state use tax and the local use taxes in the four areas in which it did business. It does not claim that the imposition of such an obligation unduly burdens interstate commerce. These are areas in which appellant has voluntarily involved itself in local commerce sufficiently to undertake the obligation to collect a tax without being discouraged from operating its interstate business, areas in which local governments have a legitimate claim to impose a fair share of the cost of local government. *See* **National Geographic Society v. California Equalization Board,** 430 U. S. 551 (1977).

But here appellant is faced with the possibility of different rates and regulations being imposed by every city and county in the state, whether or not appellant has any contact with that locality apart from interstate mail or common carrier, precisely the situation of greatest concern to this Court in **National Bellas Hess.** If the obligation to collect these local taxes is upheld, then

rather than merely having to comply with the variations among the tax laws of the 50 states and the laws of political subdivisions in which it has knowingly sought to do business, appellant would be faced with the obligation to collect the use taxes of thousands of localities in which it neither has offices or agents nor solicits business.

The magnitude of this task was recognized by members of Congress as long ago as 1965 in the Report of the Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, H. R. Rep. No. 565, 89th Cong., 1st Sess., 841-74 (1965) (the "Report"). Local sales taxes were imposed at that time by more than 2,300 localities, and in over 63 percent of such localities outside of Illinois, a use tax complemented the local sales tax. *Id.* at 846.

The special problems created by this proliferation of local sales and use taxes were closely analyzed in the Report. The sheer burden of filing tax returns alone would be staggering, the study concluded, if sellers were required to file returns with any substantial portion of the 2,300 localities imposing sales taxes. Moreover, the information-gathering problems created by such taxes are virtually insurmountable. It is necessary for the seller to screen each order to determine not only which jurisdictions impose the tax but also the tax base, rates, and collection procedures for particular localities. *Id.* at 862. Absent statewide uniformity, the seller is faced with a paucity of published material; again this may require direct inquiry of the localities involved. *Id.* at 862-63.

Additional problems, the Report emphasized, arise in assigning sales to the proper communities so that the correct tax decision may be made. For example, the expansion of city limits during the year or even the founding of new cities may make it difficult to determine in what community the purchaser of the product resides. *Id.* at 863.

Finally, where the taxing unit is a county or where reports are filed by county, the address of the buyer—postal or shipping—serves as no more than a clue to the proper disposition of the transaction. *Id.*

Yet the special subcommittee considered the situation it surveyed in 1965 to be only the beginning of a disastrous trend:

> If the existing situation is not entirely satisfactory, there is every indication that the future will bring more problems rather than fewer. There is no reason to doubt that the present strong trend toward the adoption of local [use] taxes will continue. . . . Because of the limitations on other sources of revenue, the pressure for additional money will inevitably cause more and more localities to adopt the [use] tax.[4]

Report at 874.

Considering that there are 79,862 local governmental units in the United States,[5] the enormity of the potential burden on interstate commerce is clear.

Indeed, much of the growth in burdensome local use taxes predicted by the subcommittee report apparently has already begun. In 1965 only 37 states had use taxes and in only 10 states had political subdivisions enacted local use taxes. Report at 611-14, 846. By 1979, however, some 45 states and the District of Columbia required out-of-state sellers to collect use taxes on goods delivered to their residents and 21 of these states also allowed local sales and use taxes. [1980] State Tax Guide 2d ed. (CCH) ¶¶ 60.00-60.960. The burden upon an interstate

4. Although the original report referred to "sales" taxes, it noted that its discussion was actually focusing upon the problems created when local sales taxes are supplemented by local use taxes. Report at 607, 874.

5. U. S. Bureau of the Census, Statistical Abstract of the United States, 1979, p. 510.

business of complying with these diverse taxing statutes, like the burden of the cumulative local taxes in **Nippert v. City of Richmond,** 327 U. S. 416 (1946), upon an itinerant salesman, unconstitutionally burdens interstate commerce.[6] If the decision below is permitted to stand, the ultimate result will be to discourage mail order businesses from operation among the states.

For the first time, a court has permitted a state to confer the constitutional benefits of its contacts with an out-of-state vendor on each and every political subdivision in that state and the imposition of a local use tax collection obligation on all such vendors, although those vendors have no contact with those localities but through intrastate commerce. The imposition of such a burden is contrary to the rationale of existing decisions of this Court.

Although **National Bellas Hess,** *supra,* 386 U. S. at 756, noted that the two constitutional claims discussed therein were "closely related," the Court's requirement of an adequate "link" between the entity upon which the burden to collect taxes was imposed and the taxing jurisdiction in order to avoid unduly burdening interstate commerce also reflects due process notions of fairness: "The 'simple but controlling question is whether the state has given anything for which it can ask return.'" *Id., citing* **Wisconsin v. J.C. Penney Co.,** 311 U. S. 435, 444 (1940). Interstate commerce thus must pay its "fair share" but only of the costs of local government benefits that such commerce enjoys.

This same analysis should apply to locally-imposed taxes. Thus, in **McLeod v. J. E. Dilworth Co.,** 322 U. S.

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6. Strictly speaking, the obligation imposed upon petitioner is only to collect the tax. N. Y. Tax Law [Art. 28] § 1131(1). However, the nexus requirement must nevertheless be met because section 1133 of the Tax Law makes petitioner directly liable for the tax whether collected or not. *See* **National Bellas Hess,** *supra,* 386 U. S. at 757, n.9.

327 (1944), this Court disallowed the attempted imposition of a sales tax by Arkansas.[7] In doing so, however, the Court distinguishd an earlier case, **McGoldrick v. Berwind-White Co.**, 309 U. S. 33 (1940), in which a municipality's attempt to impose a similar tax was upheld. The constitutional analysis employed in both cases was the same: The entity taxed in **Berwind-White** had sufficient contacts with New York City to justify the imposition of that jurisdiction's tax while the entity in **McLeod** had no such contacts, thus receiving nothing for which a tax could be charged. *See* 322 U. S. at 329.

In the case at hand, the localities at issue have not provided such things as "fire and police protection," **National Geographic Society**, *supra*, 430 U. S. at 561, for which they had a right to ask a return—the duty to collect their use taxes. Indeed, they have provided nothing to appellant because its contacts with the locality are minimal: catalogs and flyers are mailed in, orders are received through the mails and are accepted outside of the taxing jurisdiction—indeed out-of-state—and goods are shipped in interstate commerce by mail and common carrier to the purchasers. On similar facts, this Court held that it would be unconstitutional for a collection duty to be imposed upon the mail order seller; to hold otherwise would be

> to repudiate totally the sharp distinction . . . drawn between mail order sellers with retail outlets, solicitors, or property within a state [the taxing jurisdiction there], and those who do no more than communicate

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7. Although in **McLeod**, the Court was faced with a Commerce Clause question, the "close relation" recognized in **National Bellas Hess**, *supra*, 386 U. S. at 756, between that clause and the Due Process Clause makes the **McLeod** analysis equally applicable in the context of a due process fairness test.

> with customers in [that jurisdiction] by mail or common carrier as part of a general interstate business.[8]

National Bellas Hess, *supra,* 386 U. S. at 758.

The New York Court of Appeals attempted to circumvent this sharp distinction by maintaining that the state, rather than any of the taxing localities, has imposed the tax collection obligation, 49 N. Y. 2d at 535; A32-A33, as if the state had passed the various local taxes and set their rates, rather than merely authorizing the localities to do so and agreeing to provide the collection mechanism to those localities for a fee. Yet this claim cannot withstand closer analysis. The obligations would not exist had the localities not chosen to impose them, the localities bear the burden of enforcing the tax because they must pay the state for enforcement, and it is the local politicians who must bear the brunt of unpopularity that may result from the tax.

Moreover, this Court has indicated that the imposition of taxes by localities is different in practical effect from the imposition of like taxes by states, despite it being true that in "legal theory" the localities exercise power

8. A comparison with **Scripto, Inc. v. Carson,** 362 U. S. 207 (1960), further supports the conclusion that the contacts in the instant case are inadequate to justify the imposition of the tax. **Scripto** represented the farthest this Court has been willing to go in upholding use taxation of an interstate business. The Georgia corporation in **Scripto** had no office or place of business in Florida and no property or regular full-time employees there. But, it did have ten brokers, wholesalers, or jobbers who engaged in "continuous local solicitation" of sales throughout Florida. *Id.* at 211. In the case at hand, appellant's only intrastate connection with the localities involved consists of forwarding occasional orders received from such localities to the Chicago office, but it does not actively solicit those orders. Such a passive role cannot constitute the type of "continuous local solicitation" with which **Scripto** was concerned. *See also* **Miller Brothers Co. v. Maryland,** 347 U. S. 340, 347 (1954) ("exploitation of the consumer market").

delegated by the state. *See* **Nippert v. City of Richmond,** *supra,* 327 U. S. at 429. Similarly, even if in "legal theory" this collection duty results from a delegation of state authority, it is nevertheless necessary to ask whether the actual recipient of the tax benefits is the state or the locality in order to determine which entity is the one which must be given something for which it can ask return. Since the localities are indeed the recipients of the tax benefits and have conferred no benefits upon appellant, the unfairness of the tax is manifest.

Therefore, the attempted imposition of the collection duty in the instant case is no less burdensome or less unfair than that in **National Bellas Hess.** Consequently, it is no less unconstitutional.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Court should note probable jurisdiction to review and reverse the judgment from which this appeal is taken.

Respectfully submitted,

BERNARD G. SEGAL,
RALPH S. SNYDER,
JAMES D. CRAWFORD,
Attorneys for Appellant.

SCHNADER, HARRISON, SEGAL & LEWIS
1719 Packard Building
Philadelphia, Pennsylvania 19102

RAYMOND N. FRIEDLANDER,
5000 W. Roosevelt Road
Chicago, Illinois 60607

P. J. DIQUINZIO
3400 Centre Square West
Philadelphia, Pennsylvania 19102
Of Counsel.

Dated: June 23, 1980

Appendix.

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
ALDENS, INC.

for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods August 1, 1965 through November 30, 1969.

DETERMINATION

The petitioner, Aldens, Inc., 500 Roosevelt Road, Chicago, Illinois, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods August 1, 1965 through November 30, 1969. (File No. 01860).

The petitioner and the Sales Tax Bureau entered into a Stipulation of Facts on September 23, 1976, and agreed to waive a formal hearing in this matter.

After due consideration, the State Tax Commission makes the following determination.

ISSUE

Whether the petitioner was required to collect and pay over the local sales and/or use taxes imposed by all jurisdictions in New York State, or to collect the local tax only where it maintained its offices in New York State.

FINDINGS OF FACT

1. The petitioner, Aldens, Inc., filed sales and use tax returns for the periods August 1, 1965 through November 30, 1969.

2. The petitioner executed a consent extending the time within which to issue an assessment of sales and use taxes for the periods in issue to June 20, 1970.

3. On March 5, 1970, the Sales Tax Bureau issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner for the periods August 1, 1965 through November 30, 1969 in the amount of $77,933.44, plus penalty and interest of $15,968.62, for a total of $93,902.06. The petitioner timely filed an application to review the aforementioned determination.

4. Aldens, Inc., is a corporation organized and existing under, and by virtue of the laws of the State of Illinois. During the tax periods in issue, the petitioner conducted a mail-order business in all fifty states of the United States, as well as in foreign countries and territories. It has its main office and several warehouses in the State of Illinois.

5. Aldens Catalog Offices, Inc., is a wholly-owned subsidiary of Aldens, Inc., and was organized and operated under the laws of the State of Indiana as a sales agent for Aldens, Inc. It has a principal office for the transaction of its business in Chicago, Illinois. It maintained and operated four offices in the State of New York, viz:

a. 403 Main St., Buffalo, N. Y. (Erie County)—6 employees;

b. 130 Main St., Rochester, N. Y. (Monroe County) —7 employees;

c. 109 South Warren St., Syracuse, N. Y. (Onondaga County)—6 employees;

d. 450 West 33rd St., New York, N. Y. (New York City)—10 employees.

The telephone numbers and locations of each of the offices were listed in the telephone directory serving the area in which each of these offices was located.

6. Employees in the offices located within the State of New York, among other functions, took orders by telephone and solicited orders by telephone. The petitioner solicited business mainly by catalogs sent through the mails. Merchandise was delivered to customers located in New York State by mail or common carrier.

7. During the taxable periods involved, the petitioner was a vendor registered under Section 1134 of the Tax Law. The petitioner collected a state sales and use tax on its sales to customers in the State of New York. In addition, it collected local sales and use taxes for the four localities in which Aldens Catalog Offices, Inc. then maintained offices, namely, Erie County, Monroe County, Onondaga County and New York City. The petitioner collected no local sales or use taxes for shipments to any other localities in the state.

8. The Notice of Determination referred to in Finding of Fact "3", supra, is based on the failure of the petitioner to collect and pay over the local sales tax on shipments made outside those localities within the State of New York where the petitioner maintained no offices.

CONCLUSIONS OF LAW

A. That Article IX, section 2(c)(8) grants the power to local government with respect to "the levy, collection and administration of local taxes authorized by the Legislature, consistent with laws enacted by the Legislature."

B. That the petitioner was a person required to collect the tax, as defined in section 1131(1) of the Tax Law to include "every vendor of tangible personal property or services."

C. That the reliance by the petitioner on the case of *National Bellas Hess Inc. v. Department of Revenue of the State of Illinois,* 386 U. S. 753, 87 Sup. Ct. 1389, is misplaced since in that case the taxpayer had no office, solicitors, telephone numbers, etc. in the State, and the State had no local use tax similar to that of the State of New York.

D. That the obligation to collect the local sales and use taxes imposed by all jurisdictions in the State does not impose any undue burden on interstate commerce *(Nelson v. Sears, Roebuck & Co.* 312 U. S. 359, 85L ed 888; *Nelson v. Montgomery Ward & Company, Inc.* 312 U. S. 373, 85L ed 897); nor does it violate the due process clause of the Fourteenth Amendment *(National Geographic Society v. California Board of Equalization,*— U. S. Supreme Court decided April 4, 1977).

E. That the petitioner was expressly required to collect and pay over the local sales and use taxes imposed by all jurisdictions in the State in accordance with the provisions of section 1137(a) (b) and (c) and 1254(a) of the Tax Law.

F. That the determination of the Sales Tax Bureau is correct and the petition of Aldens, Inc. be and the same is hereby denied.

STATE TAX COMMISSION

JAMES H. TULLY, JR.
President

MILTON KOERNER
Commissioner

THOMAS H. LYNCH
Commissioner

DATED: Albany, New York
August 16, 1977

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany, at the County Courthouse, Albany, New York, on the 27th day of March, 1978.

Index No. 6221 78

PRESENT:

HON. CON G. CHOLAKIS,

Justice.

In the Matter of the Application of ALDENS, INC.,

Petitioner,

—against—

JAMES H. TULLY, JR., MILTON KOERNER and THOMAS H. LYNCH, constituting the Tax Commission of the State of New York,

Respondents.

To review a Determination based upon an agreed Stipulation of Facts which denied a Petition for Revision of a Determination of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the periods from August 1, 1965 to November 30, 1969.

Upon reading and filing the notice of petition, the petition herein, verified the 9th day of December, 1977, the respondents' answer, verified February 14, 1978, the petitioner's reply, verified March 22, 1978 and on the papers and proceedings heretofore filed herein and said matter having been presented during the above-stated Term of this Court and having been argued by Joseph H. Murphy,

Esq., for the petitioner and by Lawrence J. Logan, Esq., Assistant Attorney General of counsel, for respondents, and due deliberation having been had thereon and the Court having rendered its opinion in writing, dated the 5th day of July, 1978, a copy of which is attached hereto and made a part hereof,

Now, on motion of the Hon. Louis J. Lefkowitz, Attorney General of the State of New York (Lawrence J. Logan, Esq., of counsel), attorney for respondents James H. Tully, Jr., Milton Koerner and Thomas H. Lynch, constituting the State Tax Commission of the State of New York, it is hereby

ORDERED, ADJUDGED AND DECREED, that the petition herein be and the same hereby is dismissed on the merits.

ENTER

DATED: July 18, 1978.
Troy, New York

/s/ CON G. CHOLAKIS
Con G. Cholakis

Justice of the Supreme Court

Judgment entered this 20 day of July, 1978.

GUY D. PAQUIN
County Clerk
County of Albany

STATE OF NEW YORK
SUPREME COURT
COUNTY OF ALBANY

In the Matter of the Application of ALDENS, INC.,
Petitioner,

—against—

JAMES H. TULLY, JR., MILTON KOERNER and THOMAS H. LYNCH, constituting the Tax Commission of the State of New York,
Respondents.

To review a Determination based upon an agreed Stipulation of Facts which denied a Petition for Revision of a Determination of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the periods from August 1, 1965 to November 30, 1969.

Special Term—Albany County—March 27, 1978
CON. G. CHOLAKIS, *Justice,* Presiding
Calendar No. 1

APPEARANCES:

HANCOCK, ESTABROOK, RYAN,
SHOVE & HUST, ESQS.
JOSEPH H. MURPHY, ESQ., of counsel
Attorneys for Petitioner

Attorney General
LAWRENCE J. LOGAN, ESQ., of counsel
Assistant Attorney General
For the Respondents

MEMORANDUM

CHOLAKIS, *J.*

The petitioner, an Illinois corporation, is in the mail order business selling in all fifty states of the United States and several foreign countries and territories. Its operation consists, basically, of mailing its catalogues throughout its sales areas and filling any orders it receives at its Illinois office. The orders are received by mail and delivered to its customers by parcel post or common carrier.

During the period in question (August 1, 1965 through November 30, 1969) petitioner also maintained, through a wholly owned subsidiary, four telephone offices in New York State. These offices, located in the counties of Erie, Monroe and Onondaga and the City of New York, received telephone orders and actively sought orders by making telephone calls to prospective customers.

Petitioner collected and remitted to the Sales Tax Bureau of the State of New York Department of Taxation and Finance all New York State sales and compensating use taxes on shipments of personal property sold to customers in New York State together with all local sales and compensating use taxes on shipments of personal property sold to customers in the four areas in which it had telephone offices. It did not collect or remit any local sales or compensating use taxes on any shipment of personal property in any other area of New York State.

It is conceded by all parties that the orders were accepted and filled by the petitioner in the State of Illinois, therefore the sales tax provisions of our law cannot apply. New York State and local authorities make use of the complementary use tax (Tax Law § 1110) which taxes the purchaser for the "use" of tangible personal property within the State. The use tax is upon the buyer and not

the seller, and since the buyer is within the jurisdiction of the state and local governments imposing the tax, its validity is beyond question (*Hanneford v. Silas Mason, Co.*, 300 U. S. 577).

The Tax Law of New York State imposes the duty to collect sales and use taxes upon vendors of tangible personal property (Tax Law § 1131 and § 1132) and requires them to register with the tax commission (Tax Law § 1134). Petitioner was duly registered pursuant to the Tax Law and was authorized to do business in New York State.

It is clear that New York State cannot compel an out-of-state seller to collect its use tax absent some definite link or connection with the taxing state (*National Bellas Hess, Incorporated v. Department of Revenue of the State of Illinois*, 386 U. S. 753). It is equally clear that an out-of-state seller can be compelled to collect use tax when the sales were arranged by local agents in the taxing state (*Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62), where the out-of-state seller maintained local retail stores (*Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359; *Nelson v. Montgomery Ward & Co.*, 312 U. S. 373) and where an out-of-state seller had wholesalers or jobbers conducting continuous local solicitation in the taxing state (*Scripto, Inc. v. Carson*, 362 U. S. 207).

It is conceded by petitioner that its presence is such that it must collect and remit the state use tax for all tangible personal property delivered anywhere in New York State and local use tax for any tangible personal property delivered to customers within the four areas of the state wherein it maintained telephone offices. Petitioner alleges that it has no connection or presence in any of the other areas of the state to obligate it to collect their local use taxes.

The issue, as seen by this court, is not whether the petitioner is doing business within the various local municipalities as in the case of *Allen Steel Wool Company v. School District of Philadelphia* (425 PA 455, 229 Atl 2d 881), but whether New York State has acquired jurisdiction over the out-of-state vendor. This court concludes that jurisdiction, for sales and compensating use tax purposes, has been acquired over the petitioner and that petitioner is obligated to collect all sales and compensating use taxes that a New York State vendor would be obligated to collect. A New York State vendor is obligated to collect all sales taxes, both state and local, and in a case where the sale is made in one locality and shipped to another locality within the State, to collect any *local* use tax (Tax Law § 1254[a]).

This petitioner should stand in no better position than resident vendors.

Petitioner's petition that the January 27, 1978 determination of the Tax Commission of the State of New York be revised or annulled is hereby denied, its determination not being illegal, arbitrary or capricious.

DATED: Troy, New York
July 5, 1978

All papers to the attorney general for submission of order.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building, in the City of Albany, New York, commencing on the 19th day of March, 1979.

PRESENT:

HON. A. FRANKLIN MAHONEY, Presiding Justice,
HON. MICHAEL E. SWEENEY,
HON. LOUIS M. GREENBLOTT,
HON. ROBERT G. HAIN,
HON. ANN T. MIKOLL, Associate Justices.

In the Matter of ALDENS, INC.,

Appellant,

—against—

JAMES H. TULLY, JR., et al., Constituting the State Tax Commission,

Respondents.

ORDER

The petitioner having appealed from a judgment of the Supreme Court at Special Term (CHOLAKIS, J.), entered July 20, 1978, in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR Article 78, to annul a determination of the State Tax Commission, and said appeal having been presented in the above-stated Term of this Court, and having been argued by Ralph S. Snyder, Esq., for petitioner-appellant, and by Lawrence J. Logan, Esq., Assistant Attorney General, of counsel, for respondents, and after due deliberation, the Court having rendered a decision on the

17th day of May, 1979, Justices Louis M. Greenblott, Robert G. Main and Ann T. Nikoll concurring, and Presiding Justice A. Franklin Mahoney and Justice Michael E. Sweeney dissenting in an opinion by Presiding Justice A. Franklin Mahoney, it is hereby

ORDERED that the judgment appealed from be and the same hereby is affirmed, without costs.

ENTER:

/s/ JOHN J. O'BRIEN
Clerk

DATED AND ENTERED: May 24, 1979

A TRUE COPY

/s/ JOHN J. O'BRIEN
Clerk

SUPREME COURT—Appellate Division
THIRD JUDICIAL DEPARTMENT

May 17, 1979 34822

In the Matter of ALDENS, INC.,
Appellant,

v.

JAMES H. TULLY, JR., et al., Constituting
The State Tax Commission,
Respondents.

Appeal from a judgment of the Supreme Court at Special Term (Cholakis, J.), entered July 20, 1978 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to annul a determination of the State Tax Commission.

The issue in this case is whether the petitioner was required to collect and pay over the local taxes imposed by all local taxing jurisdictions in New York. The taxpayer agrees it is responsible to collect State sales and use taxes and also local taxes.

The facts have been stipulated. Petitioner operates a mail order business in 50 states, including New York State and abroad. Its main office and several warehouses are located in Illinois where it employs over 4,000 workers. Petitioner circulates catalogs in New York State to solicit purchases through Alden's Catalog Offices, Inc., a wholly owned subsidiary of petitioner, organized under the law of Indiana, with its principal office in Chicago, Illinois. This corporation is empowered to do business in New

York State. Petitioner had no inventory in New York State outside of piece goods or raw materials which were there for processing by manufacturers or temporarily stored pending shipment to manufacturers. No sales of materials or offers of sale were made in New York State by any employees or salesmen of the petitioner. Alden Catalog Offices, Inc., has four telephone offices in New York State: in Buffalo, New York City, Rochester and in Syracuse. It carries phone listings in these locations, including the "Yellow Pages" of local directories. Its employees took orders and solicited customers by phone from within its New York offices. No other type of sales efforts were performed by them. Customers of petitioner made purchases from petitioner in several ways: by filling out an order blank from an Alden's catalog or from a mail order form and mailing it to Chicago for acceptance, by telephoning an order to a New York office which order then was sent on to Chicago for acceptance, by agreeing to a telephone solicitation by petitioner's New York employees which order was then sent to Chicago for acceptance, by personally dropping into one of the four New York offices and placing an order there which was then sent to Chicago for acceptance. Petitioner's New York offices were authorized but not encouraged to receive orders for goods sold by petitioner from persons outside the local trade area. These also were forwarded to Chicago for acceptance. The New York offices had sufficient catalogs on hand to fulfill its functions. Payments for goods by cash purchase or by deferred payment were made by the buyers directly to petitioner's Chicago office. Credit checks of deferred payment buyers were made by the Chicago office. Petitioner sent items ordered by mail or by common carrier. Petitioner collected and remitted all State sales and use taxes from its purchasers

of shipments of personal property sold to New York customers, but collected local sales and use taxes only on shipments of personal property sold to customers in areas where it had offices in New York State. On March 5, 1970, the Sales Tax Bureau issued a notice of determination and demanded payment of sales and use taxes in the amount of $77,933.44 plus penalty and interest, for a total of $93,902.06 for the period August 1, 1965 to November 30, 1969 for local sales and use taxes in counties other than the four where its New York offices were located to which goods sold by petitioner were shipped.

Petitioner urges that the assessment is impermissible as an undue burden on interstate commerce and is violative of the Due Process Clause of the Fourteenth Amendment. These two issues are closely related. State taxation which affects interstate commerce can only be justified when the burden it imposes on interstate commerce represents a fair share of the cost of local government whose protection it enjoys (*Central Greyhound Lines, Inc. v. Mealey,* 334 U. S. 334; *Freeman v. Hewitt,* 329 U. S. 249). In determining whether a tax falls within the confines of the Due Process Clause, we must inquire as to whether the state gives anything for which it can ask a return (*Scripto, Inc. v. Carson,* 362 U. S. 207; *Miller Brothers Co. v. Maryland,* 347 U. S. 340). In *National Bellas Hess v. Dept. of Revenue of Illinois* (386 U. S. 753, 756), the court concluded that the mere transaction of mail order business was not sufficient to satisfy the constitutional requirement of "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." The State tax was found to be unconstitutional. In *Bellas* the taxpayer had no place of business in the taxing state, no phone listings or solicitors of any kind. In *National Geographic*

Society v. California Equalization Bd., (430 U. S. 551), on the other hand, the court upheld the imposition of the responsibility to collect California's use tax on the taxpayer's mail order business. The presence of two of the taxpayer's advertising offices in the state for solicitation of magazine advertising was found to be a sufficient nexus between the taxpayer and the state to justify imposition of the duty. In *Scripto, Inc. v. Carson* (*supra*), the necessary basis for tax collection liability was found in the case of a Georgia-based company that had 10 part-time wholesalers, jobbers or salesmen conducting continuous local solicitation in Florida and forwarding the orders from that state to Georgia although not maintaining an office or place of business in Florida and having no property or full-time employees there. All these cases involve collection of state sales and use taxes rather than local use taxes. We note that in *National Bellas Hess v. Dept. of Revenue of Illinois* (*supra*), the court stated that the same considerations which justify and legalize responsibility for the collection of state taxes are equally applicable to local taxes.

At issue here is whether "presence" in the State for purposes of imposing responsibility for collection of State sales and use taxes which petitioner does not contest is, also, "presence" sufficient to impose a responsibility to collect local taxes in those counties outside of the four in which petitioner has its New York offices. Petitioner presents a two-fold argument: one based on the concept of undue burden on commerce and one based on a statutory interpretation of the relevant sections of the Tax Law.

Petitioner contends that it is not a person required by State statute to collect local sales and use taxes in those localities where its only contact with the locality is by mail and common carrier, as part of a general interstate

business. Article 29 of the Tax Law contains enabling legislation which allows local communities to impose sales and use taxes. Section 1210 thereof provides that the provisions of article 28 dealing with State taxes shall be applied to local taxes whenever those provisions can be made applicable. Section 1254 imposes the duty to collect taxes on persons defined and enumerated in section 1131 (subd. [1]). This section places responsibility for tax collection on "vendors of personal property." The term vendors is defined in section 1101 of the Tax Law. In relevant part, it concludes a person maintaining a place of business or substantial presence in the State.

Petitioner suggests that the word "locality or county" must be substituted in place of the word "state" in the definition of vendor in order not to violate the clear meaning and the logic of the whole statutory scheme. Petitioner urges that to do otherwise would violate the clear meaning of section 1220 of the Tax Law which provides that a tax imposed by a locality applies only within the territorial limits of the city, county or school district imposing the tax. We find no basis for support of petitioner's logic in section 1220. Petitioner urges that the section indicates a recognition that, as a State cannot impose a duty to collect a use tax on someone who does not engage in certain activities within the State (Tax Law, § 1101), the duty to collect local taxes will not be imposed on someone who does not engage in the same activities within a particular locality. The statutory scheme refutes petitioner's position. Section 1101 (subd. [8], par. [i], subpar. [B]) applies to sales made "at such place of business or elsewhere." Section 1131 (subd. [4]) subjects to the use tax "all property sold to a person within the state, whether or not the sale is made within the state." We note that section 1213 of the Tax Law provides for the collection of use taxes by vendors on deliveries outside the local jurisdiction

"where the sale is made." These provisions relate to the collection of revenues and are not an extension of taxing powers beyond the limits of the locality imposing the tax. A transposition of "county or locality" for "state" in section 1101 is not mandated by the statutory scheme.

Petitioner contends also that section 1254 lends support to his argument that the language of section 1101 must be adjusted because it appears to refer to the duty to collect taxes to a double situation, namely, "a person required to collect tax" (as defined in section 1131) and also one "who is required to collect any state tax." Petitioner argues that, if collecting a State tax is enough to thrust responsibility to collect a local use tax, the two phrases would be unnecessary. Rather than lending support to petitioner's argument, we construe the phraseology to be only a catchall device, unnecessarily redundant. Further, section 1254 specifically refers to section 1131 (subd. [1]). The definition of vendor in section 1101 (subd. [8], par. [i], subpar. [B]) when used in section 1254, therefore, is not necessarily modified by the limiting language of section 1210 as petitioner argues. Petitioner's strained interpretation is unpersuasive. Petitioner would have us apply the concepts of undue burden on interstate commerce to intrastate activities. The term "state" is not interchangeable with the terms "city" or "school district" since the plenary jurisdiction attributes of the State cannot appropriately be attributed to a county and city or a school district.

We concur with the position of the Tax Commission. The protection of the Interstate Commerce Clause is lost once the corporation is found to have a sufficient presence within the State. The petitioner's four offices in New York State and its employees constitute such a presence *(National Geographic Society v. California Equalization Bd., supra)*. Since it is present within the State, it is subject to the same general rules applicable to any other New York

vendor. The interpretation of the Tax Commission is a reasonable and rational one and must be upheld (*Matter of Howard v. Wyman*, 28 N. Y. 2d 434).

Judgment affirmed, without costs.

GREENBLOTT, MAIN and MIKOLL, *JJ.*, concur; MAHONEY, *P. J.* and SWEENEY, *J.*, dissent and vote to annul in the following memorandum by MAHONEY, *P. J.*

MAHONEY, *P. J.* (dissenting).

The oft-enunciated rule for imposition of local burdens on foreign corporations engaging in interstate commerce is that there must be some minimum connection between the State and that which it seeks to tax (*National Geographic Society v. California Equalization Bd.*, 430 U. S. 551; *National Bellas Hess v. Dept. of Revenue of Illinois*, 386 U. S. 753, 756; *Miller Brothers Co. v. Maryland*, 347 U. S. 340, 344-45). The mere solicitation of sales by a foreign corporation absent a permanent sales office or sales force within the taxing state, does not justify the imposition of a duty to collect state sales and use taxes (*compare National Bellas Hess v. Dept. of Revenue of Illinois, supra; Miller Brothers Co. v. Maryland, supra, with National Geographic Society v. California Equalization Bd., supra; Scripto, Inc. v. Carson*, 362 U. S. 207). The same rule should apply to sales and use taxes imposed by local governments (see *National Steel Corp. v. City of New York*, 1 Misc. 2d 1012, affd. 283 App. Div. 862, mot. to dism. app. den. 307 N. Y. 837, mot. to delay oral argument granted 308 N.Y. 745; cf. *Society of Plastics v. City of New York*, 68 Misc. 2d 366, 385). To do otherwise would tend to "balkanize the American economy" by exposing foreign corporations to an array of varying local tax rates without a corresponding nexus to the taxing localities (see *National Bellas Hess v. Dept. of Revenue of Illinois,*

supra, pp. 759-60; cf. *Matter of Gillette Co. v. State Tax Comm.,* 56 A.D. 2d 475, 482, affd. 45 N. Y. 2d 846). Therefore, petitioner should not be responsible for collection of local sales and use taxes in counties where it does not have an office or sales force. Accordingly, the determination should be annulled.

STATE OF NEW YORK
COURT OF APPEALS

3 No. 74

In the Matter of
ALDENS, INC.,

Appellant,

v.

JAMES H. TULLY, JR., et al.,

Respondents.

(74) Ralph S. Snyder, Philadelphia, pro hac vice, & Joseph H. Murphy, Syracuse, for appellant.

Robert Abrams, Attorney-General (Shirley Adelson Siegel & Lawrence J. Logan of counsel) for respondent.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

JONES, *J.*

When a foreign mail order business corporation is licensed to do business within the State and, through a wholly-owned subsidiary, maintains offices and employees doing business at four different localities in the State, it is neither an undue burden on it in violation of the commerce clause of the Constitution of the United States nor a deprivation of its right to due process for the State to require the corporation to collect local, as distinguished from state, use taxes on goods sold and delivered by it to purchasers at every locality within the State, despite the fact its only contact with such locality is by mail and common carrier.

Petitioner, an Illinois corporation engaged principally in a mail-order merchandise sales business, brought this

Article 78 proceeding to review a determination by the State Tax Commission imposing liability on it for the collection and remittal of local sales and use taxes on all sales of goods to customers within New York State between August 1, 1965 and November 11, 1969. Its petition alleged that during the period in question it had been engaged in a mail-order business in all 50 states of the United States as well as in foreign countries or territories with its main offices and warehouses in the State of Illinois. Petitioner had made a wide distribution of catalogs by mail throughout these areas; using blanks included in the catalogs customers mailed their orders to the Illinois offices where the orders were accepted and filled, either by direct mail or by common carriers. Petitioner did not sell or offer for sale in New York any merchandise through its employees or salesmen. A wholly owned subsidiary of petitioner organized under the laws of Indiana and maintaining its principal offices in Illinois, Alden Catalog Offices, Inc., had four telephone offices in New York, one each in New York City and the counties of Monroe, Erie and Onondaga, with a total of 29 employees. The function of these offices was to receive telephone orders for catalog items from customers. Subsidiary duties of employees at the four offices included telephone solicitation of orders made from the several offices and receipt of orders from persons who might come to the offices personally. All such orders were forwarded to petitioner's Illinois headquarters for acceptance. Employees at these offices engaged in no sales activities outside the offices. The telephone number and location of each of the offices were listed in the telephone directory serving the area in which it was located, including the "Yellow Pages" of such directory, but no listing was included in any directory serving metropolitan areas other than those in which

the offices were located. The subsidiary had no other business locations or employees of any kind in the state.

For the period in question petitioner duly collected and paid to the Sales Tax Bureau of the State Department of Taxation and Finance the State sales and compensating use taxes on all sales to customers located anywhere within the state as well as local sales and use taxes imposed on sales to customers located in Erie, Monroe and Onondaga Counties and in New York City, the areas where the subsidiary, Alden Catalog Offices, Inc., maintained offices. On March 5, 1970 the Sales Tax Bureau notified petitioner that there were use taxes [1] due for the period in question which, with penalties and interest, totalled $93,902.06. This assessment was predicated on petitioner's failure to collect and remit to the Bureau local use taxes on goods sold to customers in areas within the state in which such local taxes were imposed other than the four areas in which offices of Alden Catalog Offices, Inc. were located. Following petitioner's request for a review and reversal of the Sales Tax Bureau's determination by the State Tax Commission the parties entered into a stipulation of the facts recited above, after which, on August 16, 1977, the Commission issued its determination that the deficiencies had been properly determined by the Bureau.

In the present Article 78 proceeding, in which petitioner has thus far been unsuccessful, it urges three arguments—one statutory and two constitutional—in support of its demand for annulment of determinations which have held it liable for collection and remittal to the Sales Tax Bureau of local use taxes on items sold by mail order

1. Although the administrative determinations spoke collectively of the obligation to collect sales and use taxes, only the collection of use taxes is actually involved in this case. There is no contention that any sales—as distinguished from delivery of goods in fulfillment of sales completed at petitioner's Illinois offices—were made in New York.

to customers in areas in which neither it nor its subsidiary maintained any business office or employees. First, it asserts that although it was required by the provisions of Article 28 and 29 of the Tax Law to collect state use taxes on goods sold to customers anywhere in the state and to collect local use taxes on goods sold to customers in the four tax units in which its subsidiary had its offices, nothing in the statute imposed on it a corollary duty to collect local taxes with respect to sales made within the state but outside those four areas. Next, it contends that if the Tax Law be found to have imposed such a duty, it both places an undue burden on interstate commerce [2] and also violates the Due Process Clause of the United States Constitution.[3] Finally, petitioner argues that if the Tax Law is construed constitutionally to impose on it the obligation to collect local use taxes, the Due Process Clause prohibits the imposition of retroactive liability for prior uncollected taxes.

We turn first to the question whether there is statutory authority for requiring petitioner to collect the challenged local use taxes. Article 28 of the Tax Law adopted in 1965 provided for the imposition of the state sales and use taxes (§§ 1105, 1106, 1110) setting out exemptions and the details of administration of the taxes so imposed (L 1965, ch. 93). Article 29, simultaneously enacted, defined the authority of cities, counties and school districts to impose or to have imposed for their benefit a variety of local taxes. Included in this article was a provision empowering cities and most counties within the state by local law, ordinance or resolution to impose sales and use taxes "identical, except as to rate and except as otherwise provided herein, with the corresponding provisions in such article twenty-eight, including the definition and

2. U. S. Const., art. I, § 8.

3. U. S. Const., 14th Amdt., § 1.

exemption provisions of such article, so far as the provisions of such article twenty-eight can be made applicable to the taxes imposed by such city or county and with such limitations and special provisions as are set forth in this article" (§ 1210[a][1]). The section expressly provided that such local taxes were to be "administered, collected and distributed by the state tax commission", in which had been vested the authority for implementation and enforcement of the state sales and use taxes.

With respect to initial collection of the local taxes authorized by Article 29, subdivision (a) of § 1254 provided:

> "Every person required to collect tax, as defined in section eleven hundred thirty-one, who is required to collect any state tax imposed under sections eleven hundred five, eleven hundred six or eleven hundred ten, shall at the same time collect any applicable tax imposed by a city, county or school district under the authority of sections twelve hundred ten ° ° °".

Looking then, as one must, to subdivision (1) of § 1131 (within Article 28) for the definition of "persons required to collect tax", one finds such persons to be "every vendor of tangible personal property or services". Insofar as relevant to our present considerations, "vendor" was in turn defined by subdivision 8 of section 1101 of Article 28 as

> "(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article;
>
> "(C) A person who solicits business either by employees, independent contractors, agents or other representatives or by distribution of catalogs or other

> advertising matter and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article."

It remains only to retrace the steps through the statutory sections just recited to conclude that petitioner was a "vendor" under subdivision 8 of section 1101 by reason of its maintenance of four places of business in the state and its solicitation of business through its employees there (its subsidiary's four offices and their employees' activities), that as a "vendor" it was a "person required to collect tax" under subdivision (1) of § 1131 and that, in view of its uncontroverted duty to collect state taxes on sales made to all its customers located within the state, it was required by § 1254(a) also to collect local use taxes on the items which were the subject of those sales.

In refutation of this logical progression petitioner urges that, when liability for collection of local use taxes is at issue, the language of subdivision 8 of section 1101 must be judicially edited so that in place of reference in paragraph (B) to maintaining a place of business "in the state" the provision must be read as maintaining a place of business "within the local taxing unit", and that to the reference in paragraph (C) to soliciting business there must be added a limitation to "within the specific locality of the local taxes". However, no justification for such rewriting of the statutory provisions is to be found in the language or design of Article 29, the article treating local taxes. Moreover, the alterations for which petitioner contends would substantially undermine the manifest purpose of the Legislature to have a single governmental agency—the State Tax Commission—serve as administrator of sales and use tax collections, be they state or local taxes. In the case of property purchased by mail by a customer in

a city or county with which the seller's only contact was by mail and common carrier, each local taxing body would have to maintain its own use tax collection and enforcement bureau with the expenses incidental thereto, and the likelihood of success in such collection—necessarily from the buyer on the basis of individual sales—would be substantially diminished, for, as has been noted with respect to a use tax, "the impracticality of its collection from the multitude of individual purchasers is obvious" (*National Geographic v. Cal. Equalization Bd.*, 430 U. S. 551, 555). Nor is any reason advanced for imposing a heavier collection burden on a domestic corporation which is located only in a single county of the State (but which concededly must collect use taxes on all deliveries anywhere within the State) than on a foreign corporation which is located within but a single county (here four counties) within the State.

We reject petitioner's attempt to find statutory authority for the position it espouses in the use of the apparently tautological language in § 1254(a)—"Every person required to collect tax, as defined in section eleven hundred thirty-one, who is required to collect any state tax imposed under sections eleven hundred five, eleven hundred six or eleven hundred ten * * *". With nothing more than what we regard as a duplication of expression to support its argument, and with language readily available to the Legislature, were it so disposed, clearly to have limited the obligation of collection as petitioner would have it, we cannot accept the hypothesis that § 1254(a) sets up two qualifications which must be met before the obligation to collect local taxes befalls—i.e., that the person under consideration be independently required to collect the local tax (a requirement that petitioner contends could be met only by fulfillment of the definition of "vendor" with the concept of locality substituted for the language "in the state") as well as being required to collect any state sales or use tax.

We also reject petitioner's reliance on the inclusion in Tax Law, § 1210, following the authorization for local enactment of all taxes described in Article 28 in form identical to the Article 28 taxes, of the words "so far as the provisions of such article twenty-eight can be made applicable to the taxes imposed by such city or county" as indicative that the adaptations of the statutory term "vendor" for which it argues are mandated by the statute. The language quoted clearly was pertinent to the substance of the taxes themselves and their imposition and was made necessary by the fact that the taxes thereby authorized for local enactment were described only by general reference to the preceding article of the statute. In view of the inclusion of § 1254, dealing expressly with collection of local taxes adopted pursuant to Article 29, and its specificity, there is no occasion to modify that section by reason of the provision contained in § 1210 relevant to the substance of the taxes.

We therefore conclude that there was no error in the determination by the State Tax Commission and the courts below that petitioner was required by Tax Law, § 1254(a) to collect and remit local use taxes on goods sold to customers within the state but outside the taxing units in which petitioner maintained a place of business.

Next to be addressed is the contention that the statute as so construed unreasonably burdens interstate commerce and deprives petitioner of its right to due process in contravention of the United States Constitution. It should be noted at the outset that petitioner raises no challenge to the power of local authorities that have enacted sales taxes to impose compensating use taxes on goods bought outside the taxing area, recognizing the decision in *National Geographic v. Cal. Equalization Bd.* (430 U. S. 551, *supra*) and cases cited therein as authority for the existence of such power. It relies however on *Nat. Bellas*

Hess v. Dept. of Revenue, (386 U. S. 753) and an extrapolation it would draw therefrom in support of its request for reversal of the order below. The case last cited, addressing claims of violation of due process and creation of an unconstitutional burden on interstate commerce advanced by an out-of-state mail order seller resisting a statutory obligation to collect state use taxes on the items of its sales, summarized the law as follows:

> "These two claims are closely related. For the test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this area are similar. See *Central R. Co. v. Pennsylvania,* 370 U. S. 607, 621-622 (concurring opinion of MR. JUSTICE BLACK). As to the former, the Court has held that 'State taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys.' *Freeman v. Hewit,* 329 U. S. 249, 253. See also *Greyhound Lines v. Mealey,* 334 U. S. 653, 663; *Northwestern Cement Co. v. Minnesota,* 358 U. S. 450, 462. And in determining whether a state tax falls within the confines of the Due Process Clause, the Court has said that the 'simple but controlling question is whether the state has given anything for which it can ask return.' *Wisconsin v. J. C. Penney Co.,* 311 U. S. 435, 444. See also *Standard Oil Co. v. Peck,* 342 U. S. 382; *Ott v. Mississippi Barge Line,* 336 U. S. 169, 174. The same principles have been held applicable in determining the power of a State to impose the burdens of collecting use taxes upon interstate sales. Here, too, the Constitution requires

> 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' *Miller Bros. Co. v. Maryland,* 347 U. S. 340, 344-345; *Scripto, Inc. v. Carson,* 362 U. S. 207, 210-211. See also *American Oil Co. v. Neill,* 380 U. S. 451, 458." (386 U. S. 756-757, fn. omitted.)

The Court then concluded that, because the out-of-state seller's only connection with buyers in the state was by mail or by common carrier, the required nexus to permit the state's imposition of the burden of collection of its use tax was not present.

Petitioner argues by wishful extrapolation that the imposition of the duty of collection of all local use taxes within the State on a seller which is located only in particular counties within the State and whose only connection with buyers in other local tax areas is by mail or by common carrier is similarly infirm. However, simply because there are constitutional limitations on the burdens which may be placed on interstate commerce it does not follow, nor is there any precedent for holding, that that burden is to be measured by further compartmentalization of each state into its municipal subdivisions. No historical predicate is advanced to indicate that in assuring protection of commerce among the several states, any such intrastate partitioning was contemplated, and petitioner cites no Supreme Court case so holding. The cases in that court dealing with the obligation of collection of use taxes have all dealt with state, rather than local, taxes (e.g., *Scripto v. Carson,* 362 U. S. 207; *General Trading Co. v. Tax Comm'n,* 322 U. S. 335; *Nelson v. Sears, Roebuck & Co.,* 312 U. S. 359).

In pleading for a nexus between the out-of-state seller and each local tax area as a necessary predicate for

the imposition of tax collection liability petitioner overlooks what is a significant, indeed decisive, fact in the situation presented by this case—namely, that the obligation for petitioner's collection of local use taxes has been imposed by state, not local, action, i.e., the enactment by our State Legislature of Tax Law, § 1254(a). Indeed, the levies of the local use taxes were themselves only a product of enabling state action, without which they would have been ineffective and invalid. In the adoption and imposition of local use taxes, cities and counties exercise a power vested in the state, only to the extent and within the limits the state has seen fit to delegate such authority to them. With respect to collection of the use taxes which local governmental bodies may elect to assess, the State Legislature has seen fit not to delegate, but has itself directed that the obligation for collection shall rest on those who qualify as vendors under Tax Law, § 1101(8)—for present purposes, sellers who maintain a place of business in the state and make sales to persons within the state. The legislation by which this was accomplished is no less the state's imposition of a duty than is its imposition on such vendors of a duty to collect the state use tax levied by Tax Law, § 1110.

That being so, the only question appropriately to be raised is whether petitioner's activities within the state "adequately establish a relationship or 'nexus' between the [petitioner] and the State" such that the obligations imposed are not unconstitutional (*National Geographic v. Cal. Equalization Bd.*, 430 U. S. 551, 556, *supra*). There can be no real doubt as to this issue. The *National Geographic* case found a sufficient nexus on a showing no stronger than that demonstrated by the present record. There the out-of-state seller's maintenance of two offices within the state for solicitation of advertising for its magazine was adequate for its subjection to use tax collection

duty with respect to items of mail order sales made to customers within the state of California; here petitioner's subsidiary's maintenance of four offices with 29 employees for receipt, and some solicitation, of telephone orders can be no less adequate. For the privilege of doing business in the state thus enjoyed by petitioner, the state may ask a return in the form of tax collection. Indeed, petitioner has not contended otherwise but frankly admits that it has at all times during the period in question complied with the obligation imposed on it to collect state use taxes. The state is no less entitled to require its collection of use taxes enacted by cities and counties pursuant to the State's delegated authority.

Finally, we find without merit petitioner's claim that if the relevant Tax Law provisions are now construed constitutionally to impose upon it the obligation to collect local use taxes, the Due Process Clause of the federal Constitution prohibits the imposition of retroactive liability for prior uncollected taxes. In support of this claim it is apparently suggested that the State Tax Commission was obligated at some time prior to the Sales Tax Bureau's determination on March 5, 1970 to advise petitioner of its collection obligation. No statutory or decisional support for such a proposition is tendered, and lacking any such tender we decline to recognize such an affirmative obligation on this governmental agency. We are confronted with no more than the delayed enforcement of a collection obligation which petitioner chose to ignore. Insofar as petitioner seeks to find support in the alleged fact—not a part of the stipulation between the parties—that the Tax Commission promulgated a Model County or City Sales and Use Tax Resolution which employed the word "County" as the place of doing business of one described as a "vendor", it need only be observed that the Commission is without authority, by promulgation of such

material or in any other way, to amend or to contravene the unambiguous language of the statute; nor, of course, may it be foreclosed on any theory of estoppel.

The order of the Appellate Division should be affirmed, with costs.

* * *

Order affirmed, with costs. Opinion by Jones, J. All concur.

Decided March 25, 1980

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

3 No. 74

In the Matter of
ALDENS, INC.,

Appellant,

v.

JAMES H. TULLY, JR., et al.,

Respondents.

REMITTITUR

The appellant in the above entitled appeal appeared by Hancock, Estabrook, Ryan, Shove and Hust; the respondents appeared by Robert Abrams, Attorney General, State of New York.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion by Jones, J. All concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Albany County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

JOSEPH W. BELLACOSA,
Joseph W. Bellacosa,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, March 25, 1980.

STATE OF NEW YORK
COURT OF APPEALS

IN THE MATTER OF THE APPLICATION OF ALDENS, INC.,

Appellant,

against

JAMES H. TULLY, JR., MILTON KOERNER, and THOMAS H. LYNCH, constituting the Tax Commission of the State of New York,

Respondents.

Index No. 6221-78

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Aldens, Inc., the above-named appellant, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York entered in this action on March 25, 1980.

This appeal is taken pursuant to 28 U. S. C. § 1257(2).

JOSEPH H. MURPHY
Joseph H. Murphy
HANCOCK, ESTABROOK, RYAN,
SHOVE & HUST
One MONY Plaza
Syracuse, New York 13202
Attorney for Appellant

Dated: June 18, 1980.

STATE OF NEW YORK
COURT OF APPEALS

IN THE MATTER OF THE APPLICATION OF
ALDENS, INC.,

Appellant,

against

JAMES H. TULLY, JR., MILTON KOERNER, and THOMAS H. LYNCH, constituting the Tax Commission of the State of New York,

Respondents.

Index No. 6221-78

STATE OF NEW YORK
COUNTY OF ONONDAGA } *ss.:*

JOSEPH H. MURPHY, being duly sworn, deposes and says that deponent is not a party to this action, is over the age of 18 years, and resides in Fayetteville, New York. That on June 18, 1980, deponent served a copy of Notice of Appeal to the Supreme Court of the United States on Hon. Robert Abrams, Attorney General of the State of New York, The Capitol, Albany, New York 12224, by depositing same in a post office receptacle at One MONY Plaza, Syracuse, New York.

JOSEPH H. MURPHY
Joseph H. Murphy

Sworn to before me this
18th day of June, 1980.
JEANNE ROMAN
Notary Public

JEANNE E. ROMAN
Notary Public, State of New York
No. 4695564, Onondaga County
My Commission Expires March 30, 1981

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

IN THE MATTER OF THE APPLICATION OF ALDENS, INC.,

Appellant,

against

JAMES H. TULLY, JR., MILTON KOERNER, and THOMAS H. LYNCH, constituting the Tax Commission of the State of New York,

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Attorney for Appellant

Dated: June 18, 1980.

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IN THE MATTER OF THE APPLICATION OF ALDENS, INC.,

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Notary Public, State of New York
No. 4695564, Onondaga County
My Commission Expires March 30, 1981

Supreme Court, U. S.
FILED
JUL 21 1980
MICHAEL RODAK, JR., CLERK

[K-88]

In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2028

In the Matter of the Application of ALDENS, INC.,
Petitioner-Appellant,

against

JAMES H. TULLY, JR., MILTON KOERNER, and THOMAS H. LYNCH, constituting the Tax Commission of the State of New York,

Appellees.

MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEES JAMES H. TULLY, JR., MILTON KOERNER AND THOMAS H. LYNCH, CONSTITUTING THE TAX COMMISSION OF THE STATE OF NEW YORK

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Appellees
The Capitol
Albany, New York 12224
Telephone: (518) 474-7175

SHIRLEY ADELSON SIEGEL
Solicitor General of the
State of New York

LAWRENCE J. LOGAN
Assistant Attorney General of the
State of New York
of Counsel

The Daily Record
Rochester, New York

Spaulding Law Printing
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In The

Supreme Court of the United States

OCTOBER TERM, 1979

No.

In the Matter of the Application of ALDENS, INC.,
Petitioner-Appellant,

against

JAMES H. TULLY, JR., MILTON KOERNER, and THOMAS H. LYNCH, constituting the Tax Commission of the State of New York,

Appellees.

MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEES JAMES H. TULLY, JR., MILTON KOERNER AND THOMAS H. LYNCH, CONSTITUTING THE TAX COMMISSION OF THE STATE OF NEW YORK

The appellees move the Court to dismiss the appeal herein on the ground that it does not present a substantial Federal question or, in the alternative, to affirm the judgment of the Court of Appeals of New York, on the ground that it is manifest that the Federal questions raised are so unsubstantial as not to need further argument.

Question Presented

When a mail order business corporation, organized under the laws of a sister state, but licensed to do business within the State of New York, through a wholly-owned subsidiary maintains offices and employees doing business at four different locations

in the State of New York, is it an undue burden on it, in violation of the Commerce Clause of the Constitution of the United States, or a deprivation of its right to due process, for the State to require the corporation to collect and transmit to the State local, as distinguished from State, use taxes on goods sold and delivered by it to purchasers at localities within the State where it does not maintain an office nor employees?

The Nature of the Case

In 1965 the State of New York enacted a Statewide sales and use tax on personal property to be administered and enforced by the State Tax Commission (New York Tax Law, Article 28). The law imposed on vendors the obligation to collect the tax (Tax Law, §1131[1], §1101[b][8][B] and [C]). The State also delegated to localities the authority to impose local sales and use taxes (Tax Law, Article 29). However, the State reserved unto itself the right to have such local taxes to be "administered and collected by the state tax commission" (Tax Law, §1250). The State statute thus provided that every person required to collect the State tax shall at the same time collect any applicable local tax (Tax Law, §1254). This was done for obvious reasons. The burden placed on the vendor was limited to the filing of a single tax return with the State Tax Commission rather than multiple returns; the administrative cost of collection and enforcement was reduced and there was a single unified interpretation of the statute by one agency, the State Tax Commission. "Persons required to collect tax" was defined as "every vendor of tangible personal property or service" (Tax Law, §1131[1]). "Vendor" was defined as

> "(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article;

> "(C) A person who solicits business either by employees, independent contractors, agents or other representatives or by distribution of catalogs or other advertising matter and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article;"

The appellant, Aldens, Inc., is a corporation organized and existing under the laws of the State of Illinois with its main office and several warehouses in Illinois from which it conducts a mail order business. Aldens, Inc., qualified to do business in New York, filed franchise tax returns for the years 1965 through 1969 with the New York State Tax Commission in accordance with Tax Law, §209, paying a tax to New York State on all its revenues derived from the New York market. Aldens Catalog Offices, Inc. is a wholly-owned subsidiary of Aldens, Inc. and is organized under the laws of the State of Indiana as a sales agent for Aldens, Inc. It has its principal office in Chicago, Illinois and maintained and operated four offices in the State of New York. The office in Buffalo (Erie County) had six employees, the office in Rochester (Monroe County) had seven employees, the office in the City of Syracuse had six employees and the office in New York City had ten employees. The offices were listed in the local telephone directories including the "yellow pages" thereof. The offices solicited and took orders over the telephone or in person from customers both inside and outside the local area of the office. They also received credit applications at the offices. All orders and credit applications were forwarded to the main office in Chicago. The merchandise was forwarded by appellant from its Chicago office to the purchaser by parcel post or common carrier.

During the tax period (August 1, 1965 through November 30, 1969), the appellant Aldens, Inc. filed sales and use tax returns with the State of New York. The returns disclosed that the appellant had collected and remitted to the State the full amount of State sales or use taxes (at that time 2%) on all shipments of

merchandise by appellant to purchasers in the State of New York. The returns further disclosed that the appellant had collected and remitted to the State the local sales or use taxes on all shipments of merchandise by it within the four localities where the appellant's offices were maintained, to wit: The Counties of Erie and Monroe and the Cities of Syracuse and New York*. The appellant did not collect and remit to the State, local use taxes for shipments of its merchandise to purchasers in any other localities in the State of New York. At that time, other localities in the State had in effect local sales or use taxes**.

In or about November 1967 the appellant executed a consent extending the period of limitation for assessment of the sales and use taxes under Articles 28 and 29 of the Tax Law to any time on or before March 20, 1970.

On March 5, 1970, the State Tax Department issued a Notice of Determination and Demand for Payment of sales and use taxes against the appellant for the periods between August 1, 1965 through November 30, 1969 in the amount of $77,933.44 plus penalty and interest in the amount of $15,968.62, for a total of $93,902.06. The appellant timely filed an application to review the determination.

The appellant and the Tax Department entered into a Stipulation of Facts on September 23, 1976 in lieu of a formal hearing.

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*The Counties of Erie and Monroe and the Cities of Syracuse and New York had during this period enacted local sales and use taxes. These localities contain 61% of the entire population of New York State (NY Legis Ann, 1977-79, pp 1321-1354).

**During the period August 1, 1965 through February 29, 1968, in addition to the Counties of Erie and Monroe and the Cities of Syracuse and New York approximately 10 to 13 other New York localities had enacted sales and use taxes.

On August 16, 1977, the State Tax Commission issued its determination affirming the Determination and Demand of March 5, 1970 for payment.

The appellant then brought a proceeding in Supreme Court, Albany County, for judicial review of the determination of the appellee. A judgment dismissing the appellant's petition on the merits was entered in the Office of the Clerk of Albany County on July 20, 1978. The appellant appealed said judgment to the Appellate Division, Third Department of the Supreme Court of New York. On May 24, 1979 an order was entered in the Office of the Clerk of that Court affirming the judgment appealed from. The appellant appealed to the Court of Appeals of the State of New York from said order. On March 25, 1980 a final judgment was entered in the Office of the Clerk of the Court of Appeals affirming the order of the Appellate Division, Third Department.

The appeal to this Court was filed in the Court of Appeals and the Supreme Court, Albany County on June 19, 1980. A copy of the Notice of Appeal was received by this office on June 19, 1980.

Statutes Involved

New York Tax Law

Article 28:

"§ 1101. Definitions

* * *

"(8) Vendor. (i) The term 'vendor' includes:

* * *

"(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article;

"(C) A person who solicits business either by employees, independent contractors, agents or other representatives or by distribution of catalogs or other advertising matter and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article; and

* * * "

"§ 1105. Imposition of sales tax

"On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

"(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article."

"§ 1131. Definitions

"When used in this part IV,

"(1) 'Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services;"

Article 29:

"§ 1210. Taxes of cities and counties administered by state tax commission

"Notwithstanding any other provision of law to the contrary, but subject to the limitations and exemptions in part II of this article, any city in this state or county in this state, except a county wholly within a city, acting through its local legislative body, is hereby authorized and empowered to adopt and amend local laws, ordinances or resolutions imposing in any such city or county the following taxes, * * *

"(a) (1) Either, all of the taxes described in article twenty-eight of this chapter, at the same uniform rate, as to which taxes all provisions of the local laws, ordinances or resolutions imposing such taxes shall be identical, except as to rate and except as otherwise provided herein,

with the corresponding provisions in such article twenty-eight, including the definition and exemption provisions of such article, so far as the provisions of such article twenty-eight can be made applicable to the taxes imposed by such city or county and with such limitations and special provisions as are set forth in this article; * * *."

"§ 1213. Deliveries outside the jurisdiction where sale is made

"Where a sale of tangible personal property or services * * * is made in any city, county or school district, but the property sold or the property upon which the services were performed is or will be delivered to the purchaser elsewhere, such sale shall not be subject to tax by such city, county or school district. However, if delivery occurs or will occur in a city, county or school district imposing a tax on the sale or use of such property, the vendor shall be required to collect from the purchaser, as provided in section twelve hundred fifty-four, the aggregate sales or compensating use taxes imposed by the city, if any, county and school district in which delivery occurs or will occur, for distribution by the state tax commission to such taxing jurisdiction or jurisdictions. For the purposes of this section delivery shall be deemed to include transfer of possession to the purchaser and the receiving of the property by the purchaser."

"§ 1250. Administration and collection

The taxes imposed under the authority of sections twelve hundred ten, twelve hundred eleven, twelve hundred twelve and twelve hundred twelve-A shall be administered and collected by the state tax commission in the same manner as the taxes imposed under article twenty-eight of this chapter are administered and collected by such commission. All of the provisions of such article relating to or applicable to the administration and collection of the taxes imposed by that article shall apply to the taxes imposed under the authority of section twelve hundred ten, twelve hundred eleven, twelve hundred twelve or twelve hundred twelve-A, including sections eleven hundred one and eleven hundred eleven

and sections eleven hundred thirty-one through eleven hundred forty-seven, with the same force and effect as if those provisions had been incorporated in full into this article and had expressly referred to the taxes imposed under sections twelve hundred ten through twelve hundred twelve-A, except to the extent that any provisions of such article twenty-eight are either inconsistent with a provision of this article or are not relevant to this article. For purposes of this article, the term 'tax' in Part IV of such article twenty-eight shall include any tax imposed under the authority of section twelve hundred ten, twelve hundred eleven, twelve hundred twelve or twelve hundred twelve-A. Wherever there is joint collection of state and local taxes, it shall be deemed that such collections shall represent proportionally the applicable state and local taxes in determining the amount to be remitted to local taxing jurisdictions."

"§ 1254. Duty to collect taxes

"(a) Every person required to collect tax, as defined in section eleven hundred thirty-one, who is required to collect any state tax imposed under sections eleven hundred five, eleven hundred six or eleven hundred ten, shall at the same time collect any applicable tax imposed by a city, county or school district under the authority of sections twelve hundred ten, twelve hundred eleven, twelve hundred twelve or twelve hundred twelve-A, and where the state tax is a retail sales tax, shall also collect any compensating use tax which may be applicable as provided in sections twelve hundred thirteen or twelve hundred fourteen."

ARGUMENT

The case does not present a substantial Federal question or presents a Federal question so unsubstantial as not to need further argument.

It is well settled that a State can validly make a vendor its tax collector. *Monamotor Oil Co. v Johnson, Treasurer of Iowa*, 292 US 86 (1934); *Felt & Tarrant Manufacturing Co. v Gallagher*, 306 US 62 (1939).

It is well settled that an out-of-State vendor can validly be made a tax collector if the vendor has a nexus between it and the State. *Monamotor Oil Co. v Johnson, Treasurer of Iowa, supra; Nelson v Sears, Roebuck & Co.*, 312 US 359 (1941); *Nelson v Montgomery Ward*, 312 US 373 (1941); *General Trading Co. v Tax Commission*, 322 US 335 (1944); *Scripto, Inc. v Carson*, 362 US 207 and *National Geographic Society v California Board of Equalization*, 430 US 551 (1977).

Appellant's argument that a "nexus" between it and each local taxing authority is a prerequisite to the imposition of the duty to collect the local tax was rejected by the New York State Court of Appeals as follows (A-8):

> "In pleading for a nexus between the out-of-State seller and each local tax area as a necessary predicate for the imposition of tax collection liability petitioner overlooks what is a significant, indeed decisive, fact in the situation presented by this case — namely, that the obligation for petitioner's collection of local use taxes has been imposed by State, not local, action, i.e., the enactment by our State Legislature of subdivision (a) of section 1254 of the Tax Law. Indeed, the levies of the local use taxes were themselves only a product of enabling State action, without which they would have been ineffective and invalid. In the adoption and imposition of local use taxes, cities and counties exercise a power vested in the State, only to the extent and within the limits the State has seen fit to delegate such authority to them. With respect to

> collection of the use taxes which local governmental bodies may elect to assess, the State Legislature has seen fit not to delegate, but has itself directed that the obligation for collection shall rest on those who qualify as vendors under section 1101 (subd [b], par [8]) of the Tax Law — for present purposes, sellers who maintain a place of business in the State and make sales to persons within the State. The legislation by which this was accomplished is no less the State's imposition of a duty than is its imposition on such vendors of a duty to collect the State use tax levied by section 1110 of the Tax Law."

That a "nexus" exists between the appellant and the State of New York is amply demonstrated by the fact that the appellant's subsidiary maintained within the State, four offices with 29 employees for the purpose of taking orders over the telephone and soliciting customers for orders by telephone. The New York State Court of Appeals thus concluded (A-9):

> "For the privilege of doing business in the State thus enjoyed by petitioner, the State may ask a return in the form of tax collection. Indeed, petitioner has not contended otherwise but frankly admits that it has at all times during the period in question complied with the obligation imposed on it to collect State use taxes. The State is no less entitled to require its collection of use taxes enacted by cities and counties pursuant to the State's delegated authority."

The Court also concluded (A-5):

> "Nor is any reason advanced for imposing a heavier collection burden on a domestic corporation which is located only in a single county of the State (but which concededly must collect use taxes on all deliveries anywhere within the State) than on a foreign corporation which is located within but a single county (here four counties) within the State."

The State of New York has a vital and direct interest in the collection of local sales and use taxes. If the State did not mandate that the vendor collect the local tax at the same time he

collects the State tax, the entire local sales and use tax programs as revenue producers would be seriously impaired. A local jurisdiction may enact, by local law, a sales and use tax; however, it cannot by such local law effectively compel a vendor beyond its jurisdiction to collect a use tax on merchandise shipped to within its jurisdiction. The New York State Legislature, aware of this fact and in order to assure that local sales and use tax programs produced maximum revenue, has by State legislation mandated the collection of the local sales and use taxes by every vendor as defined in the statute.

Effective collection of tax revenue by the localities is of the utmost importance to the State. The financial affairs of the localities have impact on the State as a whole (see *Subway-Surface Supervisors v New York City Transit*, 44 NY2d 101 [1978]; *Flushing National Bank v MAC*, 40 NY2d 731 [1976]; *Wein v State of New York*, 39 NY2d 136 [1976]; *Wein v City of New York*, 36 NY2d 610 [1975]; New York City Financial Emergency Act, Laws 1975, ch 868, as amended by ch 870; chapter 396 of Laws of 1975 as amended by ch 490 of Laws of 1976; chapter 488 of Laws of 1976 as amended by ch 489 of the Laws of 1976.)

This is not a case of "manifest unfairness of the application of the local use tax collection scheme to appellant," as the appellant argues (15). Rather, appellant seeks to obtain an unfair economic advantage over resident New York vendors. All vendors in New York are required to collect the local tax at the same time they collect the State tax. A vendor in Buffalo who ships merchandise to Albany County, which has enacted a sales and use tax, must collect the Albany tax despite the fact that such vendor has no presence in Albany County. The appellant who maintains sales offices in four localities in the State should bear the same burden which is neither an undue burden nor an interference with free trade among the states. Had the appellant, like the mail order house in *Bellas Hess*, limited its contact to New York State by

mail or common carrier, it could not be constitutionally compelled to collect any State or local taxes. The appellant, because it maintained its four sales offices in New York, falls clearly within this Court's decision in *National Geographic Society v California Board of Equalization*, 430 US 551 (1977).

The appellant's assertion, (p. 14) that the decision below would thrust upon "thousands" of mail order houses the tax collection obligation of countless local governmental units, finds no basis in the record and is patently absurd.

CONCLUSION

The appeal should be dismissed or affirmed.

Dated: Albany, New York
July 3, 1980

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Appellees

SHIRLEY ADELSON SIEGEL
Solocitor General of the
State of New York

LAWRENCE J. LOGAN
Assistant Attorney General of the
State of New York
of Counsel

APPENDIX

MTR OF ALDENS, INC. v TULLY [49 NY 2d 525]

Statement of Case

In the Matter of Aldens, Inc., Appellant, v James H. Tully, Jr., et al., Respondents.

Argued February 4, 1980; decided March 25, 1980

OPINION OF THE COURT

Jones, J.

[1] When a foreign mail-order business corporation is licensed to do business within the State and, through a wholly owned subsidiary, maintains offices and employees doing business at four different localities in the State, it is neither an undue burden on it in violation of the commerce clause of the Constitution of the United States nor a deprivation of its right to due process for the State to require the corporation to collect local, as distinguished from State, use taxes on goods sold and delivered by it to purchasers at every locality within the State, despite the fact its only contact with such locality is by mail and common carrier.

Petitioner, an Illinois corporation engaged principally in a mail-order merchandise sales business, brought this article 78 proceeding to review a determination by the State Tax Commission imposing liability on it for the collection and remittal of local sales and use taxes on all sales of goods to customers within New York State between August 1, 1965 and November 30, 1969. Its petition alleged that during the period in question it had been engaged in a mail-order business in all 50 States of the United States as well as in foreign countries or territories with its main offices and warehouses in the State of Illinois. Petitioner had made a wide distribution of catalogs by mail throughout these areas; using blanks included in the catalogs customers mailed their orders to the Illinois offices where the orders were accepted and filled, either by direct mail or by common carriers.

Petitioner did not sell or offer for sale in New York any merchandise through its employees or salesmen. A wholly owned subsidiary of petitioner organized under the laws of Indiana and maintaining its principal offices in Illinois, Alden Catalog Offices, Inc., had four telephone offices in New York, one each in New York City and the Counties of Monroe, Erie and Onondaga, with a total of 29 employees. The function of these offices was to receive telephone orders for catalog items from customers. Subsidiary duties of employees at the four offices included telephone solicitation of orders made from the several offices and receipt of orders from persons who might come to the offices personally. All such orders were forwarded to petitioner's Illinois headquarters for acceptance. Employees at these offices engaged in no sales activities outside the offices. The telephone number and location of each of the offices were listed in the telephone directory serving the area in which it was located, including the "Yellow Pages" of such directory, but no listing was included in any directory serving metropolitan areas other than those in which the offices were located. The subsidiary had no other business locations or employees of any kind in the State.

For the period in question petitioner duly collected and paid to the Sales Tax Bureau of the State Department of Taxation and Finance the State sales and compensating use taxes on all sales to customers located anywhere within the State as well as local sales and use taxes imposed on sales to customers located in Erie, Monroe and Onondaga Counties and in New York City, the areas where the subsidiary, Alden Catalog Offices, Inc., maintained offices. On March 5, 1970 the Sales Tax Bureau notified petitioner that there were use taxes[1] due for the period in

[1]Although the administrative determinations spoke collectively of the obligation to collect sales and use taxes, only the collection of use taxes is actually involved in this case. There is no contention that any sales—as distinguished from delivery of goods in fulfillment of sales completed at petitioner's Illinois offices—were made in New York.

question which, with penalties and interest, totaled $93,902.06. This assessment was predicated on petitioner's failure to collect and remit to the bureau local use taxes on goods sold to customers in areas within the State in which such local taxes were imposed other than the four areas in which offices of Alden Catalog Offices, Inc., were located. Following petitioner's request for a review and reversal of the Sales Tax Bureau's determination by the State Tax Commission the parties entered into a stipulation of the facts recited above, after which, on August 16, 1977, the commission issued its determination that the deficiencies had been properly determined by the bureau.

In the present article 78 proceeding, in which petitioner has thus far been unsuccessful, it urges three arguments — one statutory and two constitutional — in support of its demand for annulment of determinations which have held it liable for collection and remittal to the Sales Tax Bureau of local use taxes on items sold by mail order to customers in areas in which neither it nor its subsidiary maintained any business office or employees. First, it asserts that although it was required by the provisions of article 28 and 29 of the Tax Law to collect State use taxes on goods sold to customers anywhere in the State and to collect local use taxes on goods sold to customers in the four tax units in which its subsidiary had its offices, nothing in the statute imposed on it a corollary duty to collect local taxes with respect to sales made within the State but outside those four areas. Next, it contends that if the Tax Law be found to have imposed such a duty, it both places an undue burden on interstate commerce[2] and also violates the due process clause of the United States Constitution.[3] Finally, petitioner argues that if the Tax Law is construed constitutionally to impose on it the

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[2](US Const, art I, § 8.)

[3](US Const, 14th Amdt, § 1.)

obligation to collect local use taxes, the due process clause prohibits the imposition of retroactive liability for prior uncollected taxes.

We turn first to the question whether there is statutory authority for requiring petitioner to collect the challenged local use taxes. Article 28 of the Tax Law adopted in 1965 provided for the imposition of State sales and use taxes (§§1105, 1106, 1110) setting out exemptions and the details of administration of the taxes so imposed (L 1965, ch 93). Article 29, simultaneously enacted, defined the authority of cities, counties and school districts to impose or to have imposed for their benefit a variety of local taxes. Included in this article was a provision empowering cities and most counties within the State by local law, ordinance or resolution to impose sales and use taxes "identical, except as to rate and except as otherwise provided herein, with the corresponding provisions in such article twenty-eight, including the definition and exemption provisions of such article, so far as the provisions of such article twenty-eight can be made applicable to the taxes imposed by such city or county and with such limitations and special provisions as are set forth in this article" (§1210, subd [a], par [1]). The section expressly provided that such local taxes were to be "administered, collected and distributed by the state tax commission", in which had been vested the authority for implementation and enforcement of the State sales and use taxes.

With respect to initial collection of the local taxes authorized by article 29, subdivision (a) of section 1254 provided: "Every person required to collect tax, as defined in section eleven hundred thirty-one, who is required to collect any state tax imposed under sections eleven hundred five, eleven hundred six or eleven hundred ten, shall at the same time collect any applicable tax imposed by a city, county or school district under the authority of sections twelve hundred ten". Looking then, as one

must, to subdivision (1) of section 1131 (within art 28) for the definition of "Persons required to collect tax", one finds such persons to be "every vendor of tangible personal property or services". Insofar as relevant to our present considerations, "vendor" was in turn defined by section 1101 (subd [b], par [8], cls [B], [C]) of article 28 as

"(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article;

"(C) A person who solicits business either by employees, independent contractors, agents or other representatives or by distribution of catalogs or other advertising matter and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article".

It remains only to retrace the steps through the statutory sections just recited to conclude that petitioner was a "vendor" under section 1101 (subd [b], par [8]) by reason of its maintenance of four places of business in the State and its solicitation of business through its employees there (its subsidiary's four offices and their employees' activities), that as a "vendor" it was a "person required to collect tax" under subdivision (1) of section 1131 and that, in view of its uncontroverted duty to collect State taxes on sales made to all its customers located within the State, it was required by subdivision (a) of section 1254 also to collect local use taxes on the items which were the subject of those sales.

In refutation of this logical progression petitioner urges that, when liability for collection of local use taxes is at issue, the language of section 1101 (subd [b], par [8]) must be judicially edited so that in place of reference in clause (B) to maintaining a place of business "in the state" the provision must be read as

maintaining a place of business "within the local taxing unit", and that to the reference in clause (C) to soliciting business there must be added a limitation to "within the specific locality of the local taxes". However, no justification for such rewriting of the statutory provisions is to be found in the language or design of article 29, the article treating local taxes. Moreover, the alterations for which petitioner contends would substantially undermine the manifest purpose of the Legislature to have a single governmental agency — the State Tax Commission — serve as administrator of sales and use tax collections, be they State or local taxes. In the case of property purchased by mail by a customer in a city or county with which the seller's only contact was by mail and common carrier, each local taxing body would have to maintain its own use tax collection and enforcement bureau with the expenses incidental thereto, and the likelihood of success in such collection — necessarily from the buyer on the basis of individual sales — would be substantially diminished, for, as has been noted with respect to a use tax, "the impracticality of its collection from the multitude of individual purchasers is obvious" *(National Geographic v California Equalization Bd.*, 430 US 551, 555). "Nor is any reason advanced for imposing a heavier collection burden on a domestic corporation which is located only in a single county of the State (but which concededly must collect use taxes on all deliveries anywhere within the State) than on a foreign corporation which is located within but a single county (here four counties) within the State."

We reject petitioner's attempt to find statutory authority for the position it espouses in the use of the apparently tautological language in subdivision (a) of section 1254 — "Every person required to collect tax, as defined in section eleven hundred thirty-one, who is required to collect any state tax imposed under sections eleven hundred five, eleven hundred six or eleven

hundred ten". With nothing more than what we regard as a duplication of expression to support its argument, and with language readily available to the Legislature, were it so disposed, clearly to have limited the obligation of collection as petitioner would have it, we cannot accept the hypothesis that subdivision (a) of section 1254 sets up two qualifications which must be met before the obligation to collect local taxes befalls — i.e., that the person under consideration be independently required to collect the local tax (a requirement that petitioner contends could be met only by fulfillment of the definition of "vendor" with the concept of locality substituted for the language "in the state") as well as being required to collect any State sales or use tax.

We also reject petitioner's reliance on the inclusion in section 1210 of the Tax Law, following the authorization for local enactment of all taxes described in article 28 in form identical to the article 28 taxes, of the words "so far as the provisions of such article twenty-eight can be made applicable to the taxes imposed by such city or county" as indicative that the adaptations of the statutory term "vendor" for which it argues are mandated by the statute. The language quoted clearly was pertinent to the substance of the taxes themselves and their imposition and was made necessary by the fact that the taxes thereby authorized for local enactment were described only by general reference to the preceding article of the statute. In view of the inclusion of section 1254, dealing expressly with collection of local taxes adopted pursuant to article 29, and its specificity, there is no occasion to modify that section by reason of the provision contained in section 1210 relevant to the substance of the taxes.

We therefore conclude that there was no error in the determination by the State Tax Commission and the courts below that petitioner was required by subdivision (a) of section 1254 of the

Tax Law to collect and remit local use taxes on goods sold to customers within the State but outside the taxing units in which petitioner maintained a place of business.

Next to be addressed is the contention that the statute as so construed unreasonably burdens interstate commerce and deprives petitioner of its right to due process in contravention of the United States Constitution. It should be noted at the outset that petitioner raises no challenge to the power of local authorities that have enacted sales taxes to impose compensating use taxes on goods bought outside the taxing area, recognizing the decision in *National Geographic v California Equalization Bd.* (430 US 551, *supra*) and cases cited therein as authority for the existence of such power. It relies however on *National Bellas Hess v Department of Revenue* (386 US 753) and an extrapolation it would draw therefrom in support of its request for reversal of the order below. The case last cited, addressing claims of violation of due process and creation of an unconstitutional burden on interstate commerce advanced by an out-of-State mail-order seller resisting a statutory obligation to collect State use taxes on the items of its sales, summarized the law as follows: "These two claims are closely related. For the test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this area are similar. See *Central R. Co. v. Pennsylvania*, 370 U.S. 607, 621-622 (concurring opinion of MR. JUSTICE BLACK). As to the former, the Court has held that 'State taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys.' *Freeman v. Hewit*, 329 U.S. 249, 253. See also *Greyhound Lines v. Mealey*, 334 U.S. 653, 663; *Northwestern Cement Co. v. Minnesota*, 358 U.S. 450, 462. And in determining whether a

state tax falls within the confines of the Due Process Clause, the Court has said that the 'simple but controlling question is whether the state has given anything for which it can ask return.' *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444. See also *Standard Oil Co. v. Peck*, 342 U.S. 382; *Ott v. Mississippi Barge Line*, 336 U.S. 169, 174. The same principles have been held applicable in determining the power of a State to impose the burdens of collecting use taxes upon interstate sales. Here, too, the Constitution requires 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-345; *Scripto, Inc. v. Carson*, 362 U.S. 207, 210-211. See also *American Oil Co. v. Neill*, 380 U.S. 451, 458." (386 US 756-757.) The court then concluded that, because the out-of-State seller's only connection with buyers in the State was by mail or by common carrier, the required nexus to permit the State's imposition of the burden of collection of its use tax was not present.

Petitioner argues by wishful extrapolation that the imposition of the duty of collection of all local use taxes within the State on a seller which is located only in particular counties within the State and whose only connection with buyers in other local tax areas is by mail or by common carrier is similarly infirm. However, simply because there are constitutional limitations on the burdens which may be placed on interstate commerce it does not follow, nor is there any precedent for holding, that that burden is to be measured by further compartmentalization of each State into its municipal subdivisions. No historical predicate is advanced to indicate that in assuring protection of commerce among the several States, any such intrastate partitioning was contemplated, and petitioner cites no Supreme Court case so holding. The cases in that court dealing with the obligation of collection of use taxes have all dealt with State, rather than local, taxes (e.g., *Scripto v Carson*, 362 US 207;

General Trading Co. v Tax Comm., 322 US 335; *Nelson v Sears, Roebuck & Co.*, 312 US 359).

In pleading for a nexus between the out-of-State seller and each local tax area as a necessary predicate for the imposition of tax collection liability petitioner overlooks what is a significant, indeed decisive, fact in the situation presented by this case — namely, that the obligation for petitioner's collection of local use taxes has been imposed by State, not local, action, i.e., the enactment by our State Legislature of subdivision (a) of section 1254 of the Tax Law. Indeed, the levies of the local use taxes were themselves only a product of enabling State action, without which they would have been ineffective and invalid. In the adoption and imposition of local use taxes, cities and counties exercise a power vested in the State, only to the extent and within the limits the State has seen fit to delegate such authority to them. With respect to collection of the use taxes which local governmental bodies may elect to assess, the State Legislature has seen fit not to delegate, but has itself directed that the obligation for collection shall rest on those who qualify as vendors under section 1101 (subd [b], par [8]) of the Tax Law — for present purposes, sellers who maintain a place of business in the State and make sales to persons within the State. The legislation by which this was accomplished is no less the State's imposition of a duty than is its imposition on such vendors of a duty to collect the State use tax levied by section 1110 of the Tax Law.

That being so, the only question appropriately to be raised is whether petitioner's activities within the State "adequately establish a relationship or 'nexus' between the [petitioner] and the State" such that the obligations imposed are not unconstitutional *(National Geographic v California Equalization Bd.*, 430 US 551, 556, *supra)*. There can be no real doubt as to this issue. The *National Geographic* case found a sufficient nexus on

a showing no stronger than that demonstrated by the present record. There the out-of-State seller's maintenance of two offices within the State for solicitation of advertising for its magazine was adequate for its subjection to use tax collection duty with respect to items of mail-order sales made to customers within the State of California; here petitioner's subsidiary's maintenance of four offices with 29 employees for receipt, and some solicitation, of telephone orders can be no less adequate. For the privilege of doing business in the State thus enjoyed by petitioner, the State may ask a return in the form of tax collection. Indeed, petitioner has not contended otherwise but frankly admits that it has at all times during the period in question complied with the obligation imposed on it to collect State use taxes. The State is no less entitled to require its collection of use taxes enacted by cities and counties pursuant to the State's delegated authority.

[1, 2] Finally, we find without merit petitioner's claim that if the relevant Tax Law provisions are now construed constitutionally to impose upon it the obligation to collect local use taxes, the due process clause of the Federal Constitution prohibits the imposition of retroactive liability for prior uncollected taxes. In support of this claim it is apparently suggested that the State Tax Commission was obligated at some time prior to the Sales Tax Bureau's determination on March 5, 1970 to advise petitioner of its collection obligation. No statutory or decisional support for such a proposition is tendered, and lacking any such tender we decline to recognize such an affirmative obligation on this governmental agency. We are confronted with no more than the delayed enforcement of a collection obligation which petitioner chose to ignore. Insofar as petitioner seeks to find support in the alleged fact — not a part of the stipulation between the parties — that the Tax Commission promulgated a Model County or City Sales and Use Tax Resolution which employed the word "County" as the place of

doing business of one described as a "vendor", it need only be observed that the commission is without authority, by promulgation of such material or in any other way, to amend or to contravene the unambiguous language of the statute; nor, of course, may it be foreclosed on any theory of estoppel.

The order of the Appellate Division should be affirmed, with costs.

Chief Judge Cooke and Judges Jasen, Gabrielli, Wachtler, Fuchsberg and Meyer concur.

Order affirmed.